No. 2610.

United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY HEWITT, JR., Appellant,

vs.

GREAT WESTERN BEET SUGAR COMPANY, a Corporation, and MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, *Appellee.*

Brief of Defendant in Error, Mountain Home Co-Operative Irrigation Company

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

W. E. SULLIVAN and
L. L. SULLIVAN,
Boise, Idaho,
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BRIEF OF THE ARGUMENT WITH POINTS AND AUTHORITIES.

I.

The essential elements in suits of equity to vacate judgments of state courts are: 1. Federal jurisdic-

tion; 2. An equitable ground, as fraud; 3. No adequate remedy at law; 4. Meritorious defense; 5. Laches; 6. Statute of limitations.

II.

The complaint shows two attacks against proceedings in state court, as follows:

1. Against Finding 149, Conclusion 35 and Decree.

2. Against the Receiver's sale.

III.

The ground of attack against the finding, conclusion and decree is as follows:

1. Want or excess of jurisdiction.

Defendant in error contends this question, first, is res adjudicata; second, that equity will not grant relief when want or excess of jurisdiction appears on face of record, and third, the alleged error is judicial and therefore erroneous only.

The grounds of attack against the Receiver's sale are as follows:

1. That it was had in compliance with a void decree.

2. Fraud.

Defendant in error contends that the decree is valid and the question of its validity is res adjudicata and that the fraud is not sufficiently alleged, that part of the fraudulent charges are res adjudicata, that said Hewitt filed objections to the confirmation of the sale, had his day in court and should have assigned all grounds including that of fraud,

and that the complaint shows he is guilty of laches in raising the question of fraud.

IV.

The complaint shows that Hewitt had his day in court, in the state court, attacking the validity of the foreclosure decree upon the same grounds, three times, as follows:

1. By an appeal from the foreclosure decree.
2. By writ of prohibition.
3. By objections to and appeal from order confirming sale.

This court can examine the decisions of the Supreme Court, which are referred to by volume and page in the complaint, to aid in determining whether the same questions now raised were raised and passed upon by the state courts.

Allen v. Allen, 97 Fed. 525.

V.

Res Adjudicata. The decisions of the state courts on the same grounds make such matters res adjudicata.

U. S. v. Anderson, 169 Fed. 205.
Forsyth v. Hammond, 166 U. S. 517.

VI.

Adequate Remedy at Law. Hewitt pursued adequate remedies at law and still had another by appeal to the Supreme Court of the United States, which he neglected to pursue and therefore a court of equity will not assist him.

I Black on Judgments § 361.

I Black on Judgments § 363.

VII.

Due Process of Law. The allegations in the complaint, as to the decree not being warranted by the pleadings and proof, and that decree is void for excess of jurisdiction, are insufficient for a court of equity to set aside the decree as taking of property without due process of law.

Allen v. Allen, 97 Fed. 525.
U. P. R. Co. v. Flynn, 180 Fed. 565.
23 Cyc. 1004.

VIII.

Must Abide by Forum Selected. Appellant selected his tribunals and fully presented same matters, so a federal court cannot now take jurisdiction.

Bailey v. Willeford, 126 Fed. 803.

IX.

If the invalidity of the judgment or want of jurisdiction of the state court appears upon the face of the record, equity will not grant relief.

Blythe v. Hinckley, 84 Fed. 246; 173 U. S. 499.
L. R. J. Ry. v. Burke, 66 Fed. 83.
U. P. R. Co. v. Flynn, 180 Fed. 569.
N. S. L. Co. v. Johnson, 196 Fed. 58.
Robb v. Vos, 39 L. ed. 52-61.
Kaufman v. Drexel, 76 N. W. 559.
Nat. Sur. Co. etc. v. State B. etc., 120 Fed. 593.
U. S. v. Andersen, 169 Fed. 201.
I Black on Judgments § 297a, § 358.
I Joyce on Injunctions § 556.
11 Enc. Pl. & Pr. 1201.
McNeil v. McNeil, 78 Fed. 834.

X.

The error complained of, that the pleadings and proofs do not warrant the foreclosure decree in declaring the receiver's certificates prior to the Hewitt mortgage, is judicial and makes the decree erroneous only.

I Black on Judgments § 367-§ 271.
Preston v. Kindricks, 27 S. E. 588.
Petelka v. Fitle, 51 N. W. 131.
I Black on Judgments § 138.
Henderson v. Moore, 34 S. E. 446.
Allen v. Allen, 97 Fed. 525.
Ewing v. St. Louis, 5 Wall 413.

XI.

Charges of fraud not sufficient to sustain bill for following reasons:

1. That allegations of acts constituting fraud are insufficient.

2. That part of fraud is res adjudicata.

3. That the fraud should have been assigned as a ground when objections were filed to confirmation of sale.

4. That said Hewitt is guilty of laches in raising fraud.

5. That there are no allegations excusing laches.

6. That time of discovery of fraud is not alleged.

XII.

The complaint must set forth the facts constituting the fraud.

I Black on Judgments § 393.
I Black on Judgments § 369.

XIII.

Hewitt filed objections to confirmation of sale but failed to include the ground of fraud. A party must assign all the grounds he may have for the relief sought, and those not raised will be deemed waived.

14 Ency. Pl. & Pr., 119, citing many cases.

XIV.

If laches appear upon face of bill it is subject to demurrer or motion to dismiss.

6 Ency. Pl. & Pr., 405.
12 Ency. Pl. & Pr., 829-31.
I Black on Judgments § 393.
Spespy v. Comer, 76 Ala., 501.
Graham v. B. etc. R. Co., 118 U. S. 161.

XV.

Complaint must set forth facts, not conclusions, excusing laches.

I Black on Judgments, Sec. 393.
23 Cyc. 1042, 1011.
12 Enc. Pl. & Pr. 835-6-7-8.
P. etc. Ry. Co. v. K. & H. B. Co., 107 Fed. 786.
Christy v. A. etc. Co., 214 Fed. 1016.

XVI.

Must allege time of discovery of fraud.

Lataillade v. Orena, 91 Cal. 566.
Truett v. Onderdonk, 120 Cal. 581.
Robertson v. Burrell, 110 Cal. 568.
L. S. C. Co. vs. Wood, 113 Cal. 482.
Eldred v. White, 102 Cal. 600.
P. etc. Co. v. K. & H. B. Co., 107 Fed. 782.

Hendryx v. Perkins, 114 Fed. 801-811.
Hardt v. Haidmeyer, 152 U. S. 546.
Stearns v. Page, I Story 204.
Stearns v. Page, 12 L. ed. 928.
Landsdale v. Smith, 106 U. S. 394.
Hammond v. Hopkins, 143 U. S. 251.
Felix v. Patrick, 145 U. S. 317.
Foster v. Mansfield, 146 U. S. 88.
Badger v. Badger, 69 U. S. 87.
Wood v. Carpenter, 101 U. S. 135.
12 Enc. Pl. & Pr., 838.

XVII.

If fraud discovered in time should have pursued his remedy at law.

I Black on Judgments §§ 362-387.
Freeman on Judgments §§ 486-489.
3 Pomeroy's Eq. Juris § 1361.
Story Eq. Jur., §§ 894-896.
Bigelow on Estoppel, 151.
I Whitehouse Eq. Prac., § 152.
I Joyce on Irr., § 547.
Brown v. C. of B. V., 95 U. S. 157.
Nougue v. Clapp, 101 U. S. 551.
Parson v. Weis, 77 Pac. 1010 (Cal.)
T. P. A. v. Gilbert, 111 Fed. 269.
Graham v. B. etc. Co., 14 Fed. 753.

XVIII.

Must allege a meritorious defense to original action and specifically set forth the facts constituting it.

I Black on Judgments, § 393.
23 Cyc., 1031, 1039.
Christy v. Atkinson, 214 Fed. 1020.
Eldred v. White, 102 Cal. 600.

XIX.

If it appears on the face of the complaint that statute of limitations is a bar it may be pleaded by demurrer or motion to dismiss.

Chemung M. Co. v. Hanley, 9 Ida. 787.
13 Enc. Pl. & Pr., 201.

XX.

An action in Idaho on a contract in writing must be commenced within five years.

§ 4052 Ida. Rev. Codes.

XXI.

The judgment of dismissal shows (Rec. 47) what the court's position was as to the application of the statute of limitations, to-wit, that if the judgments were annulled as prayed for it would be ineffective and useless as the statute of limitation, said Sec. 4052, would be a bar to granting any second foreclosure.

XXII.

The statutes of Idaho provide for certain exceptions where the statute of limitations will not run, including certain legal proceedings but not mentioning appeals, therefore, the statute cannot be tolled by appeals.

ARGUMENT.

The Bill of Complaint herein attempts to set forth an equitable action in a federal court to set aside a decree of a state court, upon the ground that the decree, or a part thereof, is void for want of jurisdic-

tion of the state court to enter the same, and to set aside a foreclosure sale thereunder upon the grounds of fraud and that the sale was had in compliance with said void decree, and to again foreclose the same mortgage that was foreclosed in the state court.

The grounds of the motion to dismiss, briefly stated, are as follows: That the court has no jurisdiction of the subject-matter; that the plaintiff selected his forum, had his day in court and the federal court had no jurisdiction for the reasons alleged in the complaint to vacate the judgments of the state court; that the orders of the state court in regard to the receiver's sale are final and conclusive; that the matters herein raised to annul the judgment of the state court are res judicata; that the court has no jurisdiction for the reason that it is shown by the complaint that the plaintiff had plain, speedy and adequate remedies at law for the errors and matters complained of; that the federal court cannot set aside final decrees upon such fraud as alleged in the complaint; that a federal court will not set aside judgments of a state court for alleged excess of jurisdiction appearing upon the face of the record; that any relief herein is barred by reason of plaintiff's laches; that the action is barred by Sec. 4054 sub. 4 and Sec. 4050, Rev. Codes of Idaho, for want of equity in the complaint; that the facts stated in the complaint are insufficient to entitle complainant to any relief in a court of equity.

We desire to have it understood from the beginning that we accept the well-established law that a

federal court has jurisdiction under an independent equitable action to afford relief against a judgment at law of a state court, obtained by fraud, where the record is regular upon its face, and extrinsic evidence is required to show such fraud. There are many federal cases recognizing such jurisdiction of a federal court, and in fact such actions have been so litigated that the essential elements necessary to sustain such jurisdiction have become settled and universally recognized.

These essential elements may be classed as follows:

1. Federal jurisdiction.
2. An equitable ground, as fraud.
3. No adequate remedy at law.
4. Meritorious defense.
5. Laches.
6. Statute of limitations.

But we do not admit that a federal court has jurisdiction to set aside a judgment of a state court on the ground that the same is void for want or excess of jurisdiction appearing on the face of the record; on the contrary, we contend that want of jurisdiction, which does not require extrinsic evidence to show it, is not a ground which equity will recognize in this class of cases, as equity will not interfere where there is an adequate remedy at law. And especially is this so where the state court acquired jurisdiction over the parties and the subject-matter and then it is claimed the court erred in entering a judgment by granting more than the pleadings and

issues warranted. As to want of jurisdiction being an equitable ground in some cases, we admit that there are cases holding that a party may obtain equitable relief against the judgment of a state court where it appears from the face of the record that he was served with summons, when in fact he was not served, and it requires extrinsic evidence to so show, and thus the jurisdiction was obtained through artifice and fraud.

The first essential element, the federal jurisdiction, is covered in the complaint by proper allegations of diverse citizenship and jurisdictional amount.

We will, therefore, then discuss the second element mentioned above, to-wit, the equitable grounds. An examination of the complaint will show that two attacks are made, as follows:

1. One against Finding No. 149, Conclusion No. 35 and Decree in foreclosure suit in state court.

2. One against the Receiver's sale.

The ground of attack against said Finding, Conclusion and Decree is:

1. Want or excess of jurisdiction.

The grounds of attack against said Receiver's sale are:

1. That it was had in compliance with a void decree.

2. Fraud.

CHARGES IN BILL AGAINST FINDING, CONCLUSION AND FORECLOSURE DECREE.

We shall first treat of the charges made against said Finding, Conclusion and Decree, and endeavor to show this Court that on the face of the complaint the attack is without merit for the following reasons:

1. That it appears on the face of the complaint that all of the issues herein made against said Finding, Conclusion and Decree are res adjudicata.

2. That if want or excess of jurisdiction appears on the face of the record it is not an equitable ground.

3. That the alleged error is judicial and therefore erroneous only.

We will proceed to show what the allegations of the complaint are as to the invalidity of said Finding, Conclusion and Decree. The allegations on this matter are found in paragraphs 10 (Rec. 14), 15, 16 and 17 (Rec. 20-21), and may be summarized as follows:

1. State Court exceeded jurisdiction, when validity and priority of Receiver's Certificates were not made an issue in pleadings or raised during trial, as follows:

a. In making Finding No. 149 and Conclusion No. 35 as to certificates being a prior lien over all other liens and mortgages.

b. In decreeing Receiver's Certificates prior liens.

c. Therefore, Finding, Conclusion and Decree null and void.

2. Constituted a taking of property without due process of law, contrary to 14th Amendment of the Constitution of the United States.

3. Court lacked jurisdiction over Hewitt and subject-matter.

A further examination of the complaint will show that these identical matters were raised at three different times in the state courts of Idaho, and therefore, are res adjudicata. In paragraph 10 (Rec. 14) of the complaint it is alleged that the state district court in the foreclosure suit instituted by Hewitt, Jr., plaintiff herein, on its own motion wrongfully and in excess of jurisdiction, decreed, among other things, the Receiver's Certificates issued in another action to be a prior lien to all other liens, including mortgage of said Hewitt.

APPEAL FROM FORECLOSURE DECREE—HEWITT'S FIRST DAY IN COURT.

It further appears in said paragraph 10 that said plaintiff, Hewitt, Jr., was not satisfied with said decree, but attacked its validity on an appeal to the Supreme Court of the State of Idaho. The grounds of attack and those raised on appeal are specifically set forth in said paragraph 10, and show that there was then raised on appeal the same grounds as are here raised for the purpose of vacating the decree of said State Court. In order that this Court may make a comparison of the grounds of attack raised

on said appeal with the grounds of attack herein made on said decree, and hereinbefore briefly set forth in a summary, we herewith set forth the same in a concise manner, as follows:

1. That Finding 149 and Conclusion 35 were illegal and void for the reasons:

   a. Hewitt not made a party in Idaho Fruit Land Company case.

   b. Hewitt not served with notice or process.

   c. Although at institution of suit he was a prior lien holder of record.

2. Was a taking of property without due process of law, contrary to 14th Amendment.

3. Said decree is utterly void, illegal, lacking jurisdiction of subject matter and person.

Idaho Reports Referred to in Complaint Can Be Examined by This Court.

Plaintiff herein not only sets forth in his complaint the specific grounds urged on appeal in the state court, but alleges the Supreme Court affirmed the decree of the lower court which plaintiff attacked on the ground that the same was null and void, but he also refers to the decision of the Supreme Court reported in volume 20 of the Idaho reports on page 235 (Rec. 6). While it is not necessary from the specific allegations of the complaint to resort to said decision of the Supreme Court to see what grounds were raised on appeal in the state court, and decided, we believe that this Court has a legal right from the allegations of the complaint set-

ting forth the volume and page wherein said decision was rendered, to refer to said decision. Appellant claims that this Court should not refer to said decision; that this Court cannot take judicial notice of the various decisions of the Supreme Court of Idaho. While in certain cases this may be true, we submit that where a plaintiff sets forth the specific grounds that were raised on appeal, and states what the decision of the Supreme Court was, and then refers to the book and page of the State report, that such affirmative allegations and references place the matter in such a situation that this Court can examine the decision referred to, and that in so doing it will not be taking judicial notice of said decision.

As we understand the rule, a party plaintiff cannot attach an instrument to a complaint and refer to same or refer to a decision of a supreme court by volume and page and then use said decision to supply a necessary allegation in the complaint. In other words, if it was necessary to make certain allegations to sustain a cause of action, then these allegations must be specifically alleged in the complaint and could not be supplied by a clause in an instrument that was attached to the complaint and referred to. But, on the other hand, if the plaintiff attaches an instrument, or makes reference to a certain decision, then such instrument or decision can be used by the defendant to show that no cause of action exists.

In support of the position that this Court cannot take judicial notice of such decision, appellant cites

16 Cyc., 919; 131 U. S. 151, and in stating the rule contended for, adds: "although such decisions are referred to in the pleadings." An examination of these authorities will show that they do not justify the adding of such a clause, as nothing whatever is said in either citation as to the rule applying where the decisions are referred to in the pleading.

But we believe that this Court, by one of its own decisions, Allen v. Allen, 97 Fed. 525, the decision being written by Justice Gilbert, has fully settled the question of a reference to the state reports in actions of this kind to determine what the Supreme Court of the State decided. This case in all law features is almost identical with the case at bar. A bill was filed in the Federal Court seeking to enjoin the defendants from claiming any right under a judgment entered in the State Court on the ground that the Court had exceeded its jurisdiction, that it was secured by fraud, etc. And in the bill two former actions were set forth between the parties, one an action to redeem from a mortgage and another an action of ejectment, and further showing that the same questions were practically passed upon by the State Court. The bill further alleged in a brief way that the judgment of the lower court in the action to redeem was appealed from and that said judgment was affirmed by said appellate court; almost the identical allegation that is made in the complaint at bar, except a reference is herein made to the Idaho reports wherein the decisions are reported. Apparently no reference was made to the California report

wherein the decision appeared on appeal, but nevertheless this Court, as shown by 97 Fed. on page 527, referred to the decision in the Supreme Court of California, as follows:

> "The grounds of that decision were thereafter fully considered by the Supreme Court of California, on appeal, in Allen v. Allen, 95 Cal. 184, in which case the Supreme Court held, etc."

So it appears that this Court referred to the decision of the appellate court and considered what this court had held, although no reference to the reported decision was made in the complaint, at least so far as the statement of facts shows.

On page 528 of the Allen decision this Court also referred to the fact that an appeal was taken in the ejectment suit and the judgment of the lower court was affirmed. The statement of this Court is as follows:

> "On appeal that judgment also was affirmed by the Supreme Court of California in Allen v. Allen, 106 Cal. 137. In the opinion of that case the court said of its former decision in 95 Cal. 184:" (then follows the quotation.)

And neither does it appear in the bill in the Federal Court in the Allen case that any reference was made to the decision of the Supreme Court of California on appeal in the ejectment suit, but this Court nevertheless considered the opinion and quotes what that court held and then came to the conclusion that there had been a former adjudication of certain issues in the State Court, and if there was error in the judgment it was in the conclusion which

it reached, and therefore the bill in the Federal Court was wholly lacking in the features which authorize a court of equity to grant relief.

And we call particular attention to the fact that in the Allen case a demurrer was sustained by the lower court to the bill as in the case at bar, and that a decree of dismissal was filed from which the appellant appealed. So we considered that the questions of former adjudication appearing from substantial allegations in the complaint and also reference being made to the report wherein the decisions appear, have been settled and is the accepted law of this Court as reported in the Allen decision.

We therefore, think it proper for this Court to examine said decision if it desires, although it is not necessary to do so for the purpose of ascertaining whether or not the points urged on appeal as to the invalidity of the foreclosure decree are res adjudicata. Appellant contends that where a former judgment is relied on as an estoppel, it must be pleaded, and then admits that when the estoppel appears upon the face of the complaint, wherein is set forth the former adjudication, the objection may be raised by demurrer or motion to dismiss. So the only controversy between us is whether or not the complaint on its face shows that the identical questions here urged were urged before another court and decided. The allegations in the complaint as to this matter are very full and specific, and therefore, we can properly raise the question of former adjudication on our motion to dismiss.

By reference to the decision in 20 Idaho 235, it is seen that the specific allegations of the complaint are fully corroborated and that the same questions were raised on appeal as herein raised as to the validity of said decree, to-wit: that said foreclosure decree was void because it made the Receiver's Certificates a prior lien to the Hewitt mortgage, and that he not being a party, and having no opportunity to be heard, was being deprived of his property without due process of law, and that he had not had his day in court.

It is there shown that the Supreme Court in answer to appellant's contention before it that he was not a party in the other suit and that he had had no opportunity to contest the Receiver's Certificates and had not had his day in court, held:

> "Whether the appellant was a party to the suit in which such receiver was appointed does not clearly appear from the findings, but there can be no question but that in the *present suit the appellant had full opportunity*, if he saw fit, to contest such receiver's certificates, and have litigated and determined by the trial court in the present suit the question as to whether such certificates should have been allowed. And there is nothing in the record to show that the appellant, at any time during the trial, made any contest or presented any matter to the trial court, or gave any reason why the court should not allow such certificates and make them a prior lien upon the mortgage property. Certainly, when the question came before the trial court in the present case the *ap-*

pellant had his day in court, and *could have contested these certificates and their priority*, and fully litigated and offered such proof as he had, and given such reasons as existed in the law why the court should not allow the same; but the record does not disclose that the appellant took any steps to contest these liens or in any way put in issue their priority."

So it clearly appears both from the specific allegations in the complaint and also from a reference to the decision in 20 Idaho 235 that the plaintiff herein has had his day in court as to the very matters herein placed in issue as to said foreclosure decree. We term this his first day in court on these identical matters, and now proceed to his second day in court on the same matters.

WRIT OF PROHIBITION.—HEWITT'S SECOND DAY IN COURT

In paragraph 12, (Rec. 16) of the complaint it is alleged that said Hewitt petitioned the Supreme Court of the State of Idaho for a writ prohibiting the Receiver's sale "*on the grounds heretofore alleged*," and that upon a hearing said Court refused said petition.

So here again we have upon the face of the complaint the specific grounds which plaintiff states he presented to the Supreme Court in his application for a Writ of Prohibition, being the identical grounds urged on the appeal from said foreclosure decree. Again plaintiff alleges that the decision of the Supreme Court in said matter is reported in 21 Idaho 1.

While the allegations as to the grounds urged in the application for said writ are sufficient without any reference to the decision reported in the volume referred to, we call this Court's attention in corrobation thereof, to the fact it is clearly shown in said decision that the same grounds were urged in the application for said writ as set forth in the complaint herein, to-wit, that said Hewitt had had no opportunity to contest said Receiver's Certificates, had not had his day in Court, and that said foreclosure decree was in excess of and beyond the jurisdiction of the Court, and that there was a taking of said Hewitt's property without due process of law.

The Supreme Court was not inclined to pay much attention to appellant's objection, there urged the second time, to the effect that the lower court had no authority to decree the Receiver's Certificates a prior lien to the Hewitt mortgage, as is shown by the statement of said Court on page 8 as follows:

> "It has already been adjudicated by this court that the trial court had the power and authority in this case to authorize the receiver to issue receiver's certificates and to make them a prior and first lien against the property of the company superior to all existing mortgages and other liens and encumbrances. Hewitt vs. Great Western Beet Sugar Company, 20 Ida. 235."

On page 5 the Supreme Court states that the Receiver became a party in the foreclosure suit and then adds:

> "That he was taken into consideration and

treated as a party to the action by the decree is clear upon the face of the decree itself."

As showing that said Hewitt acquiesced in making the receiver's certificates prior to the Hewitt mortgage, the Supreme Court on page 6 sets forth a stipulation entered into by the attorneys for all parties in the foreclosure suit, whereby all parties, including said Hewitt, joined in presenting to the Receiver a copy of the decree in the foreclosure suit, wherein it was decreed that the receiver's certificates were prior to all liens, with the request that the decree be accepted and admitted by him as establishing the claims and liens of said parties.

In regard to this matter the Court on page 12 states:

"Under this state of facts, there is no doubt but that the plaintiff is, and all other parties to the foreclosure suits are, bound by the judgment and orders had in the receivership case and are subject to the order of the court directing the sale of the property without the right of redemption. In other words, the sale here being made is not a sale of foreclosure but is a sale by the court's receiver under direct authority and supervision of the court. The plaintiff has consented to and acquiesced in the order and decree and is now bound thereby."

Thus appellant had his second day in court in attacking the validity of said decree and protesting against the foreclosure sale on the same grounds as herein alleged against said decree. We now pass to the appellant's third day in court.

APPEAL FROM CONFIRMATION OF SALE.—HEWITT'S THIRD DAY IN COURT.

In paragraph 14 (Rec. 19) of the complaint it is alleged that said Hewitt objected to the confirmation of the receiver's sale and then states the grounds of objection as follows:

> "Upon the identical grounds urged in his appeal to the Supreme Court of Idaho in his foreclosure suit and in his petition for a writ of prohibition, more specifically set forth in Paragraph X of his complaint, to which reference is hereby made, and on the further ground that said sale was a taking of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States."

It is then alleged that the district court overruled said objections, whereupon said Hewitt duly appealed to the Supreme Court of the State of Idaho and that upon a hearing said court affirmed the order of the lower court.

And so again it appears upon the face of the complaint that the attack herein made upon said foreclosure decree was a third time presented to said Supreme Court. And as showing that said issues are res adjudicata, we have the allegation in the complaint that the questions urged upon the objections to the confirmation of the sale and presented to the Supreme Court were upon identical grounds as urged upon a former appeal and upon the said application for a writ of prohibition. And plaintiff here likewise alleges that the decision of the Supreme Court on this appeal is reported in 22 Idaho 328. An

examination of said decision will show that said Supreme Court refused to recognize any of the objections raised by said Hewitt as sufficient grounds to set aside sale or the confirmation thereof and fully sustained the order of the lower court confirming said receiver's sale.

And thus appellant had his third day in court on the issues which we are discussing and was unable to have the foreclosure decree or the receiver's sale set aside.

As showing that the federal court in the action herein has no jurisdiction to hear and determine the question of the invalidity of said Finding No. 149, Conclusion No. 35 and foreclosure decree, we will present our argument under the following heads.

1. Res adjudicata.
2. Adequate remedy at law.
3. Due process of law.
4. Must abide by forum selected.

RES ADJUDICATA.

Hewitt is estopped from now litigating the validity of Finding 149 and foreclosure decree of the State Court upon the same grounds. When the District Court entered the said finding and decree, which Hewitt claimed exceeded its jurisdiction, in that it was a taking of his property without due process of law, and that he had not had his day in court, he was entitled to have one hearing upon these grounds at some time. The hearing might have been in the same action by a motion to vacate or by motion

for a new trial or by an appeal on these same grounds. This would then constitute a trial or hearing in the District Court and the Supreme Court as to the invalidity of the decree. Or he could have treated the decree as void, if he believed such a showing made it void, and not have raised the question of the invalidity of the decree at all in the original action. But if the plaintiff did raise it and have the invalidity heard by the District Court and the Supreme Court, then he is bound by the decision of these courts.

Or if he did not care to raise the question of the invalidity on these grounds in the same action before the same Courts, and was satisfied he could establish the invalidity of the decree, not void on the face of the record, he could have waited and raised the question in a new independent action in the State Court to vacate the decree as being void upon the same grounds, but with the chance of the court saying that he should have taken his remedy at law. If he had done this, and had had a trial, he would have been bound by the final determination thereof.

Or he could have brought a similar action to vacate in the Federal Court on the same grounds.

In other words, a party is entitled to his day in Court in attacking the validity of a judgment. He can attack it in the same action at the time of the trial, by motion, or by appeal, or he can attack it in a separate action to vacate, provided excess of jurisdiction is a sufficient equitable ground; but when he has done this in either case, he is bound by the final

determination of his action. He cannot again attack its invalidity and have it tried over again in some other court. He can have his day in court to attack the judgment as being invalid, but when this has been done, the judgment is final and the same issues cannot again be tried, but are res adjudicata.

Hewitt attached the invalidity of the decree on certain grounds in a State Court which had concurrent jurisdiction with the Federal Court of such matters and therefore he is bound by the decision of the State Courts. Never again can he attack the invalidity of said decree on the same grounds in any other court.

Where Hewitt made his mistake if he desired to have the decree of the State District Court contested in the Federal Court, provided his contention is correct that excess of jurisdiction is a proper ground, was when he attacked the invalidity of the decree in the State Courts, and had them pass upon the same. He should not have appealed on the ground of invalidity of the decree, but have passed it by and then later have brought an action in the Federal Court on the grounds that he urged in the State Courts. The matter is therefore res adjudicata because it is shown in the complaint that Hewitt attacked the decree and proceedings of the Court on the same grounds at least three different times.

We admit the rule of law that jurisdiction can be questioned, but we not not admit that it can be tried a dozen times, or tried until determined in favor of the attacking party.

Courts will not re-examine questions of the validity of a decree decided by another Court for purpose of determining whether the decision was correct, either according to the principles of law or those of equity. If the Court had jurisdiction of subject matter and person as in this case, the party has had his day in court and he must correct the error on appeal or the decree will stand against him. It is the duty of a litigant to make every defense available and assert every right he has in the trial court and urge any correction he may desire on appeal. If he fails so to do, it is his own fault, and if he does raise them they become final and another court cannot help him at some future time on the matters formerly in issue.

We do not intend to burden this brief with many citations of authorities setting forth the rules as to res adjudicata. The cases are so numerous in holding that matters or issues which have been determined in the original action by a motion, or have been urged on appeal or by writ of error are conclusive and res adjudicata, that it would be imposing upon this Court to cite such cases for your consideration. And besides we do not believe there is any controversy between counsel for appellant and counsel for defendant in error as to the principles of res adjudicata. Appellant contends that the complaint does not show upon its face that the points which we are discussing are res adjudicata, and therefore, that we must plead former adjudication. On the other hand, we contend that the bill itself shows a former adjudication on the validity of Find-

ing 149, Conclusion 35 and the foreclosure decree on the identical grounds as raised in the bill of complaint herein, and therefore, we can raise the question of res adjudicata by motion to dismiss. We have hereinbefore shown by pointing out the allegations in the complaint as to the grounds upon which the validity of the decree is attacked in the action at bar that they are the same as raised in the State District and Supreme Courts. If this be true, then the decision of the lower court on our motion to dismiss as to these matters should be sustained.

We will however call the Court's attention to the general law on this point so well set forth by Judge Dietrich in the case of United States vs. Andersen, 169 Fed. 205. In that action an application was made by the United States to set aside a certain certificate of naturalization on the ground that the state court had no jurisdiction to issue the same. The state court had held it had jurisdiction and granted the certificate. No appeal was taken by the United States. The federal court dismissed the application and in so doing states as follows:

> "This court is not urged merely to reach a conclusion out of accord with that of the state court upon a question raised in an action entirely independent of the proceedings in the state tribunal. * * * By the petition here this court is asked to review merely a legal conclusion, deliberately adopted by a court of co-ordinate jurisdiction, upon a question arising upon the same facts as are here presented, and virtually to send its process into that court requiring it to vacate and set aside

its own judgment. Such a function is in its nature revisory, and necessarily implies superiority, which, under the general provisions of the law, this court does not possess. Little Rock Junction Ry. vs. Burke, 66 Fed. 83, 13 C. C. A. 341; Blythe vs. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783."

In Forsythe vs. Hammond, 166 U. S. 517, the general rules of res adjudicata are well stated where lack of jurisdiction was one of the grounds urged against the judgment of the state court; it was there held:

"Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the court of appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunal stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there chal-

lenged the decree of the circuit court, challenged it for error and also *for lack of jurisdiction.* The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of res judicata apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum.

ADEQUATE REMEDY AT LAW.

The said Hewitt tried three remedies at law and still had a fourth, an appeal to the Supreme Court of the United States. He must account for a failure to pursue such remedy. Under this principle of adequate remedy at law in actions like the one at bar, we again find that the rules in relation thereto are so well settled as to warrant little or no controversy. If a remedy at law exists, it must be pursued. One may have several concurrent remedies at law, as a motion for a new trial, a motion to vacate in an original action, an appeal, writ of error, writ of review, etc. The best rule as sustained by a great weight of authority is that the party must first exhaust all his

remedies at law. So the first question to determine is, Has time for remedy at law expired? If the time for prosecuting his remedy at law has expired, then the next question is, Why? If by his own or counsel's fault, neglect, inattention, mistake in law, etc., then equity will not grant relief. And so it is necessary in actions of this kind, to vacate the judgments of a state court, for the plaintiff to allege and show that he had no remedy at law, or if he had one, he lost same through no fault or neglect of his own. The allegations in the complaint show that a federal question was raised by Hewitt in the original action of the taking of plaintiff's property without due process of law contrary to the 14th Amendment of the Constitution of the United States, and the failure to show whether such remedy was pursued, or if it was lost, that it was not through the fault or neglect of said Hewitt or his counsel.

No judgment of the State Court can be set aside either by a State or Federal Court on the ground of some point affecting the validity of the judgment which might have been raised in the State Court, in other words, where an adequate remedy at law existed. The remedy in such instances is always a review of the judgment of the State Court by an appeal. If a defendant appeared in an action in the District Court of the State and failed to raise some question which he might have raised there, such as taking of his property without due process of law, etc., and then does not appeal to the Supreme Court, he is forever barred from raising this question. In such

a case no action could be brought in a State Court or Federal Court after the time to appeal had expired to set aside the judgment of the District Court on the ground that that Court had erroneously ruled and had taken his property in that action without due process of law.

And the same would apply if one appeared in an action in the State District Court and later appealed to the Supreme Court of the State and raised the question of due process of law. He cannot stop there and wait until the time to appeal on this question to the United States Court has expired and then seek to review the decisions of the District and Supreme Courts by an independent action in the Federal court. No, he had an adequate remedy at law by appeal and if he did not pursue same he cannot complain. In the case at bar, no action could be sustained in any State Court of Idaho to set aside the decisions of the District and Supreme Courts of the State on the ground of Hewitt's property being taken without due process of law. So a party cannot appear in an action in a State Court and not raise a question of law which might properly be raised and cease defending after a judgment in the District Court, if a federal question was raised which would make it appealable to the United States Supreme Court, and then expect relief in a Federal District Court in another action wherein is raised the same law question. All actions to review law points of this kind or errors of the State Courts would be purely cases of review and not

independent actions on a new issue and therefore can not be sustained.

So the test must be: Can the action which is being brought in the Federal Court be such an action as could be brought in the State Courts upon the same grounds to vacate a judgment obtained in the State Court?

In Ewing vs. City of St. Louis, 72 U. S. 413, it is held:

> "The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former."

The above is cited with approval in Union Pacific R. Co. vs. Flynn, 180 Fed. 572.

If the present complaint was filed and now pending in the State Court of Idaho to set aside the judgment of the District Court, what would happen? Why, the Court would examine the complaint and find plaintiff is raising the same question, viz: "due process of law," "void decree," etc., that had been raised and passed upon three times by the Idaho Courts, and would therefore hold plaintiff was simply trying to review law questions which plaintiff had an edquate remedy at law to review by appeal to the Supreme Court of the United States.

The general rule on this point is well stated in I Black on Judgments, Sec. 361 as follows:

> "Embarrassing questions sometimes arise as to the right and power of equity to interfere by in-

junction against a judgment while the party has a concurrent and equally efficacious remedy by application to the court which rendered the judgment, or by appeal to a higher court. The general rule, however, as established by the best authorities, is that the party seeking relief must have exhausted all his resources at law, for equity will not grant an injunction where there is an adequate remedy at law. Nor will the court grant an injunction to stay proceedings in another court having the same power to grant relief."

Again in Sec. 363:

"In pursuance of the same general principle, the party must have exhausted his possible remedies by appeal, writ of error, or certiorari, before equity will hear him. If, by failing to appeal, or by prosecuting an appeal in a defective or insufficient mode, he loses his remedy at law, he cannot proceed in equity by injunction, unless new and sufficient equities be alleged. Nor will a judgment be enjoined when the complainant has neglected to except to it as he might have done."

DUE PROCESS OF LAW.

One of appellant's contentions is that the foreclosure decree is void for the reason that it is a taking of his right and interest in the mortgaged property without due process of law. It is alleged in the complaint that the validity or priority of certain receiver's certificates was not made an issue in the pleadings in said foreclosure suit nor raised during the trial of said suit, but, nevertheless, the State Court

decreed that said certificates were prior to the Hewitt mortgage.

Our contention is, that the State Court in said foreclosure action had jurisdiction of the parties and subject matter, and that even if the court made a wrong decision in decreeing the priority of the liens and gave a prior lien which was not raised in the pleadings that the said Hewitt had an adequate remedy at law to appeal from said decree, and having so appealed, is bound by the decision of the Supreme Court. On his appeal Hewitt urged that it was a taking of his interest in property without due process of law and contrary to the 14th Amendment. The Supreme Court passed upon this question and came to the conclusion that his property was not being taken in violation of the 14th Amendment and without due process of law. Having had this question presented to it, and having passed thereon, its decision could only be treated as erroneous and subject to review or correction on appeal to the Supreme Court of the United States.

This matter was passed upon by this Court in Allen vs. Allen, 97 Fed. 525, hereinbefore referred to. There had been two former actions in the State Court from both of which appeals had been taken to the Supreme Court of California and the judgment of the lower court sustained in both cases. A bill in equity was then filed in the Federal Court to enjoin the defendants from claiming any rights under the judgment on the grounds that the judgment was in excess of the court's jurisdiction, was secured by

fraud, that it took plaintiff's property in violation of law, and without due process of law, that it impaired the complainants contract, etc. A demurrer was filed to the bill on the ground that said suit in equity was barred by the prior judgments of the State Courts; that the Federal Court had no jurisdiction to grant relief prayed for and that there was no equity in the bill. This Court sustained the demurrer and entered decrees dismissing the bill.

This Court held:

> "A Court of Equity cannot set aside a judgment at law, rendered by a Court which had jurisdiction, on the ground that it was not warranted by the pleadings."

And again on pages 530 and 531:

> "The appellant makes the further contention that the judgment in the ejectment case was rendered on pleadings which presented no issue and that, therefore, the judgment is void. To this it may be said that, if it was believed that the court erred in the ejectment suit in rendering judgment in the face of the admission that such written offers had been made, the remedy was to have brought the matter before the appellate court on the appeal from the judgment. This court has not the power now to correct the error, if error there were in the conclusion of law at which the court arrived in the ejectment suit in ruling that * * * "

In Union P. R. Co. vs. Flynn, 180 Fed. 565, wherein the plaintiff claimed that the State Court had acquired no jurisdiction by reason of no notice served upon him, therefore, the proceedings were void for

want of jurisdiction and amounted to a taking of property without due process of law, it was held:

> "That where a property owner, against which a special tax bill had been ordered, claimed that the proceedings were void for lack of proper notice, it had an adequate remedy at law in the State Court either by a proceeding under Section 4, or by certiorari, and hence could not maintain a bill in the Federal Circuit Court to restrain the city clerk from attesting and the circuit clerk from filing the tax bills against its property on the theory that to do so would constitute a taking of property *without due process of law.*"

In 23 Cyc. 1004 it is stated:

> "The trial court having had jurisdiction of the parties and the subject matter, its judgment will not be set aside or enjoined in equity on an allegation that it is not sustained by the pleadings in the case."

MUST ABIDE BY FORUM SELECTED.

The appellant having tried the State Courts now desires to try the same question over again in the Federal Courts and see if he cannot finally find some court who will view the law as he does.

He was plaintiff in the foreclosure action in the State Court. He selected his own forum. He could have brought his foreclosure action in the Federal Court if he desired. The Courts frown upon such complaints after a voluntary selection and trial.

In Bailey vs. Willeford, 126 Fed. 803, a case where defendant could have selected his forum by removal but chose the State Court, was defeated and appeal-

ed to the Supreme Court which affirmed the lower court, then brought another action in the State Court to set aside the judgment, and while an appeal was pending filed a bill in the Federal Court for relief, it was held:

> "That defendant, having elected to litigate the whole matter in the State Courts, and having fully presented his entire case to those courts, the Federal Court would not take jurisdiction."

And again on page 806 it is stated:

> "Unless there is something in the present bill calling imperatively upon this court to interfere, the above statement would seem to conclude the case. The complainant comes now into this court to correct, as his counsel in argument say, an injustice done him in the State Court. His issue was tried before a judge of the highest character, instinctively a just man. This judge presided at the trial of the case, and on the motion for a new trial reviewed it, and refused a new trial. It was then carried to the Supreme Court. That Court, under the law of North Carolina, can grant a new trial on errors of fact. The verdict and judgment below were affirmed by this tribunal, whose impartiality, wisdom and integrity cannot be questioned. It came again into the Superior Court, and was again heard on the ground that the verdict was obtained by fraud and perjury, and the verdict and judgment were sustained. The record discloses not even a hint that this action of the Court was otherwise than that which all know it to be, the calm judgment of a just and unprejudiced judge. The aid, then, of a court of equity was sought on a case almost precisely like that

made in this court now, and this aid was refused. The complainant is too late in seeking the aid of this court from supposed injustice in the State Court. He could have removed his case at its inception into this court because of diversity of citizenship. If he had any reason to fear prejudice or local influence, he could remove it into this court at any time before trial. *He deliberately selected his tribunal.* He made all his defenses in it. He took every chance for a successful result. Having experimented in the State Court, he cannot repeat his experiment here."

In Forsyth vs. Hammond, 166 U. S. 506, it is stated:

"One who has voluntarily sought the judgment of the Supreme Court of a state to declare that a decree of a lower court was not only erroneous but *void*, although not a voluntary litigant in the trial court, is bound by the judgment of the Supreme Court, as res adjudicata, and cannot attack it collaterally in a Circuit Court of the United States."

A FEDERAL COURT HAS NO JURISDICTION TO SET ASIDE A JUDGMENT OF A STATE COURT FOR ALLEGED WANT OR EXCESS OF JURISDICTION APPEARING ON THE FACE OF THE RECORD.

We believe that we have heretofore shown that the attack on the foreclosure decree is res adjudicata, that the appellant had an adequate remedy at law and pursued same, but we further contend that if the alleged errors complained of, want or excess of jurisdiction, appear upon the face of the record, a Federal Court will refuse to grant equitable relief.

Appellant contends that the record in the Idaho Fruit Lands case shows he was not made a party therein or served with process, and further that the pleadings in the foreclosure suit show that the validity or priority of the receiver's certificates was not made an issue, but nevertheless the District Court, of its own motion, and in excess of its jurisdiction found on these matters and decreed them prior to the Hewitt mortgage.

It appears that there are several federal cases which hold that want of jurisdiction is a sufficient ground, but an examination of these cases will show that the want of jurisdiction did not appear upon the face of the record, and all of them were cases where the record showed that the State Court apparently had acquired jurisdiction of the person of the defendant, either by personal service or by publication. Then the defendant went into the Federal Court with a complaint on the ground that the record was false, that in fact he had never been served and had no knowledge of the action, or if the service was by publication that the affidavit upon which the publication was based was false, or that the attorney who appeared for him was unauthorized. The Federal Courts have held in this class of cases there is to be an investigation of a *new* case arising upon *new* facts. And so it will be found that in all these cases the invalidity of the decree in the State Court is not apparent upon the face of the record. But there is another class of cases, followed by a great weight of authority and equally well defined,

which hold that where the record discloses that the judgment is void then equity will not intervene; and especially is this true where, like the present case, the court had jurisdiction of the parties and of the subject matter, but in entering judgment it erroneously or in excess of jurisdiction held that one lien was prior to another and there is no charge of fraud. In such cases it is held that the party was properly before the State Court on a subject matter within its jurisdiction and that then if the court granted a decree giving more relief to one party than he was entitled to then the remedy, if the judgment was erroneous, was by an appeal for a correction of the judgment, or, if beyond the jurisdiction of the court and void, it could be disregarded or set aside upon motion in the original action, or upon appeal.

The leading federal case on this question is Little Rock Junction Ry. vs. Burke, 66 Fed. 83, and we therefore call the Court's special attention to this case, wherein it was held:

> "The Federal Courts have no jurisdiction of a suit to set aside a decree of a State Court, on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal, or bill of review, in the Court which made the decree, is the proper and sufficient remedy."

And again on page 87 it is stated:

> "We have been thus particular in describing the character of the testimony that was offered and the nature of the issue that appears to have been

tried and determined in the Circuit Court, for the purpose of showing that the trial of the case clearly resolved itself into a review of the proceedings of the Pulaski Chancery Court for matters apparent on the face of the record. It is manifest that the evidence offered to impeach the decree in the suit to foreclose the tax lien was such testimony as would have been admissible to support a bill of review, or a motion in the nature of a bill of review, to vacate the decree, had the complainant seen fit to commence a proceeding of that kind in the Pulaski Chancery Court. It is also obvious, we think, that if the decree of the Chancery Court is in fact void on the ground that was and is relied upon to establish its invalidity,—that is to say, for want of jurisdiction apparent on the face of the record,—then the complainant could have obtained as full relief by a bill of review filed in the Chancery Court as by an original bill filed in the Federal Circuit Court. In addition to the consideration that a bill of review would have furnished an adequate remedy, it must be also borne in mind that the remedy by appeal was originally open to the complainant if he had seen fit to prosecute an appeal. Moreover, it is a general rule that, unless restrained by the terms of an express statute, a court of superior jurisdiction has power at any time to vacate its own judgments when it appears from an inspection of its record that a particular judgment or decree is utterly void for want of jurisdiction either over the person or the subject matter. This is an inherent power, which all courts of superior jurisdiction possess as a necessary part of the machinery for administering justice, and as a means of preventing their orders and decrees from becoming instruments in in-

justice. Black, Judgm. §§ 297, 307, and cases there cited.

Inasmuch, then, as the case at bar was essentially a suit to annul the decree of the Pulaski Chancery Court and the proceedings that had been taken thereunder, for the alleged reason that the decree was utterly void when tested by an inspection of the records, it becomes important and necessary to inquire whether the Circuit Court could properly entertain jurisdiction of a suit of that nature. It may be admitted that the Federal Circuit Courts have power to entertain suits to enjoin persons from asserting any right or title under a judgment or decree of a State Court of coordinate jurisdiction, that is alleged to have been obtained by fraud or collusion. Gaines vs. Fuentes, 92 U. S. 10; U. S. vs. Norsch, 42 Fed. 417. Possibly, a bill in equity to obtain the same relief may be entertained in any case where it is shown by proper averments that the judgment of a State Court which is apparently regular and valid, and for that reason is not subject to collateral attack, for some reason not disclosed by the record is in fact invalid and of no effect. A complaint alleging such facts would furnish a proper foundation for an original suit in equity because additional issues would be raised and new facts would be brought upon the record as the basis for independent judicial action. But a complaint or a petition which seeks to impeach a decree, without the aid of extrinsic evidence, for want of jurisdiction apparent upon the face of the record, simply imposes upon the court to which it is addressed the duty of re-examining questions that have once been tried and decided, and for that reason a proceed-

ing of that nature cannot be regarded as a new action, but is rather a continuation of the original suit."

In Blythe vs. Hinckley, 84 Fed. 246 it is held:

"A federal Court will not assume jurisdiction of a suit to vacate or annul a decree of a State Court for alleged want of jurisdiction appearing on the face of the record."

The above case was sustained on appeal to the Supreme Court of the United States, 43 L. Ed. 783.

In Nat. Sur. Co. etc., vs. State B. etc., 120 Fed. 593, it is held:

"But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree."

In U. S. vs. Andersen, 169 Fed. 201, it is held:

"Where in proceedings for the naturalization of an alien in a State Court that court deliberately reached a conclusion favorable to its jurisdiction, and adverse to the government's contention, and no steps were taken for review by the Supreme Court of the state, which alone could give an authoritative construction of the local law on which the jurisdiction depended a Federal District Court would not take jurisdiction of an application by the government to set aside the certificate of naturalization granted in the State Court proceedings, having only concurrent and not *revisory* jurisdiction."

In I Black on Judgments § 297a, it is stated:

"The Federal Courts have no jurisdiction of an

action or proceeding to vacate or set aside a judgment rendered by a State Court, on the ground that the same is void for want of jurisdiction, or is erroneous or irregular; for, in such case, the proper and sufficient remedy is by motion, appeal, or bill of review in the Courts of the state."

In I Black on Judgments § 358 it is stated:

"As to the particular case of a judgment that is absolutely void, however, the authorities do not agree. Some of the decisions hold that the defendant in a judgment cannot have equitable relief against it because it is either erroneous or void, since, if *void*, it may be disregarded or may be set aside on motion, and if erroneous it may be revised on appeal. There is much to be said in favor of this view, especially in contemplation of the known reluctance of equity to interfere if any adequate remedy offers itself at law."

In I Joyce on Injunctions § 556, it is stated:

"Where a Court has no jurisdiction of a matter before it a Court of equity will not enjoin the proceedings for in such a case a judgment rendered will be void, as will also an execution issued thereon and in such a case the remedy at law is ample and adequate."

In Kaufman v. Drexel, 76 N. W. 559, it is held:

"An action may be maintained to enjoin the enforcement of a void judgment when there is a concurrence of the following conditions: (1) The judgment must be without any legal or equitable basis. (2) Its invalidity must not appear on the face of the record. (3) The party complaining must be without an adequate remedy at law."

In 11 Enc. Pl. & Pr. 1201 it is stated:

"On the other hand, where it appears from the bill that the judgment is wholly void for want of jurisdiction over person or subject-matter, or for other reasons, a good cause of action exists in some states on that ground alone. * * * * The contrary doctrine, however, seems more in accord with the nature of equitable jurisprudence, which takes cognizance of the acts of the person rather than of the defects in a law judgment. Where it obtains, a bill grounded only on the invalidity does not state a cause of action, but complainant is left to remedy at law."

ERRORS, IF ANY, WERE JUDICIAL AND ERRONEOUS ONLY

Again, are not the errors complained of herein as to said finding, conclusion and foreclosure decree judicial errors? Where the court has jurisdiction of the subject matter and the parties in the original action then the following are mere errors at law:

1. That complaint or pleadings will not warrant the judgment.
2. That judgment is not supported by findings.
3. That judgment is excessive.

In I Black on Judgments, Sec. 367, it is stated:

"Nor can a court of equity set aside a judgment, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings."

In I Black on Judgments § 271 it is stated:

"Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that

the evidence was before the court and that it fully justified the conclusion reached. If a party rely upon the fact that there was no evidence in a case, where evidence was necessary, he must establish it by a proper bill of exceptions, or he will fail."

As heretofore shown, this court, in Allen v. Allen, 97 Fed. 525, has so held, and said case is cited to support the quotation set forth above from Black on Judgments. Many other cases are also cited by that author.

In Preston v. Kindrick, 27 S. E. 588, it is held:

"Though the pleadings and proof in a suit by a vendor to subject the land to payment of the price did not authorize a personal decree against defendant for the deficiency after sale, where the court had jurisdiction of the parties and the subject-matter, rendition of the personal decree was merely an error for which relief could be had under Code § 3451, and hence equitable relief against such decree would not be granted."

Again it is further held:

"Relief in equity will not be awarded against a judgment or decree on the ground that the complaint in the cause did not warrant it, where the court had jurisdiction of the cause and of the parties."

And again in the decision it is stated:

"It is insisted that the bill in the case of Preston v. Kindrick, etc., did not warrant the court in rendering a personal decree against Mrs. Kindrick for the residue of the purchase price of the land remaining unpaid after crediting upon it the proceeds of sale, and that as to this sum the court was

clearly without jurisdiction, and its decree is void. Conceding that the pleadings and proof in that case did not authorize a decree against her for that sum, it was a mere error of the court. The court had jurisdiction of the parties and of the subject-matter."

In I Black on Judgments, Sec. 367, it is also stated that a court of equity will not set aside a judgment, rendered by a court which had jurisdiction "because there was no finding of fact to support the judgment."

In Petelka v. Fitle, 51 N. W. 131, it is held:

"A judgment is not void for want of a finding of fact to support it. While it is erroneous and subject to reversal, by proper proceedings brought for that purpose, yet the lack of such a finding is no cause for enjoining the collection of the judgment."

It is also further held:

"The sole defect in the record is that it contains no finding of fact; but the want of a finding does not render the judgment void. It is merely erroneous, and would be sufficient grounds for reversal in proper proceedings brought for that purpose."

SAME RULE WHERE JUDGMENT IS FOR EXCESSIVE AMOUNT.

The present case would be like one where the court entered a judgment for an amount greater than plaintiff's demand. In such a case we understand the rule to be that the judgment for the excessive

amount is irregular and erroneous and liable to reversal but is not void.

The rule seems to be well stated in I Black on Judgments, Sec. 138:

> "And first, it is an undisputed rule that if a judgment be rendered for a greater sum, whether by way of debt or damages, than is laid in the ad-damnum clause, or claimed in the declaration, petition or complaint, or notified to the defendant by the demand in the summons, then the judgment will be erroneous and liable to reversal * * *. But it must be observed that a judgment so rendered for an excessive amount is not void." (Citing many cases.)

In Henderson v. Moore, 34 S. E. 446, it is held:

> "Injunction will not be granted to restrain enforcement of an execution on the ground that the judgment is excessive, the court in which it was rendered having jurisdiction, and no fraud being alleged. The irregularity, if any, should have been corrected by appeal, or motion."

The plaintiff in the action at bar must allege, in order to secure equitable relief, that the point passed upon by the state court which he claims exceeded the jurisdiction of the court must not have been intended by the court but was entered through fraud or accident or mistake; otherwise the plaintiff's remedy was at law. If the error made which is claimed to be in excess of the jurisdiction of the court is judicial instead of merely clerical, arising from the application of the mind of the court to the facts in the case and resulting in the award of a sum greater than it

should justly be, equity has no power to interfere, the remedy being by appeal or other appropriate proceeding at law.

In I Black on Judgments, Sec. 367, it is further stated:

> "So, an illegal allowance in a judgment, or an error in the calculation of interest, is no ground for an injunction."

Then that author goes on to state that if the judgment had been entered for an amount not intended through fraud equity would grant relief. So it appears that if the court, after consideration, knowingly entered a judgment for an amount which it deemed proper, in a case where it had jurisdiction of the parties and subject matter, even though it exceeded its jurisdiction or decreed on a matter not before it by the pleadings but being in relation to the subject matter, such judgment is erroneous and the remedy is by motion or appeal in the original action. It is not like a case referred to by the same author wherein a judgment would be void if the court exceeded its jurisdiction and passed upon a matter that was entirely foreign to the action, for instance in a case referred to by said author, where a foreclosure suit is brought and a man and his wife, being parties thereto, a decree of divorce is granted. There can be no question about such a decree being void, but even then, as heretofore shown, a court of equity is not the place to correct such error. But where the court, having jurisdiction of the person and parties, enters a decree in regard to the very

property in litigation, which point might have been put in issue by the pleadings, we then have an erroneous decree only, at least so far as an equitable action is concerned.

NO MATTER WHETHER FORECLOSURE DECREE BE VOID ON FACE OF RECORD, OR ERRONEOUS, EQUITY WILL NOT RELIEVE.

If the record on its face shows the court actually did exceed its jurisdiction, then it is void or partially void. However, many authorities hold that a record which merely shows that the court passed on a question or point not warranted or placed in issue by the pleadings is not void on its face, but erroneous. The same is true if the judgment is not supported by a finding. Then it is encumbent upon the party to proceed in the original action by motion for a new trial and call the lower court's attention to the error, and if it refuses to correct same, then to appeal and take up a record of the testimony and ask for a reversal.

This is appellant's situation exactly as his main contention as to the invalidity of the foreclosure decree is, first, that the decree is not warranted by the pleadings and proof, and second, that Finding 149 was not supported by the evidence.

Said Hewitt sought to correct these errors by appeal and took up a record of the pleadings and proof and lo and behold the Supreme Court found that the decree is valid, that it is warranted by the plead-

ings and proof and that Finding 149 was a proper finding. Now as to the foreclosure decree he is raising nothing new here, it is the same old complaint he presents, to-wit, that the decree is not supported by the pleadings and said finding was improper in the foreclosure suit.

So if the errors complained of in this regard are erroneous, plaintiff has no standing in this Court, his remedy was an appeal and he pursued same.

So, also, if it is held the record on its face shows the foreclosure decree is void, then equity will grant no relief. In either case, to give equity jurisdiction, new facts must be placed in issue, as fraud in obtaining the excessive decree.

We understand the law to be that the "matter in issue" is not determined solely by the pleadings, but may include material matter which arises during the trial and is controverted between the parties, and is made the subject of evidence and argument. In I Black on Judgments, Sec. 614, it is stated that this is a much better rule than one holding that the "matter in issue" must be determined upon the face of the pleadings in the former proceedings. In such cases the doctrine of res adjudicata does not rest upon the fact that a certain point has been made an issue by the pleadings, but upon the fact that it has been fully and fairly investigated and tried. And again some of the cases go so far as to hold that a judgment is conclusive not only upon the questions actually contested and determined, but upon all matters which, under the issues, might have been litigat-

ed and decided in that suit. It seems that by a great weight of authority that the "matter in issue" is a material point or question raised by the parties in their pleadings or drawn into controversy by the course of the evidence.

Placing appellant in the very best position that is permissible, under the allegations of the complaint herein, the federal court has before it a record of the state court in the foreclosure suit, which fails to show *affirmatively* that it had jurisdiction under the pleadings to pass upon the priority of the receiver's certificates, while yet the record does not show want of jurisdiction because it is presumed that the court had jurisdiction to enter the decree and that the question of the priority of the receiver's certificates necessarily arose during the course of the trial, and that there was ample proof to support Finding 149 and the Decree on this point.

Clearly this is a matter which could only be reviewed and determined in the original action unless there is a charge of fraud in the obtaining of the decree on this point. What would have been the proof of appellant herein if he had been allowed to proceed to trial in the federal court? It would have been the judgment roll in the foreclosure suit and further a transcript of the evidence showing that no proof was offered as to the receiver's certificates. In other words, there would have been nothing examined except the records, proceedings and evidence in the foreclosure suit. It would simply be a review and there would be no issue raised upon new facts which

is always necessary in actions of this kind to vacate a judgment of a state court.

The test is: Would the evidence offered to impeach the decree in the suit to foreclose be the evidence which could have been embodied in a bill of exceptions or record on appeal, or would it be new evidence entirely outside the record and evidence in the foreclosure suit, such as attacking the obtaining of the decree on the ground of fraud? Again suppose a motion for a new trial had been made, would the record and testimony in the foreclosure suit when presented be sufficient to show the court that it had entered a decree not warranted by the pleadings or the proof? There can be no question that the record and evidence in the foreclosure suit would settle the entire matter and it would not be necessary to resort to extrinsic evidence. Such being the case, a federal court, if it took jurisdiction, would simply be exercising revisory jurisdiction and simply reviewing matters actually presented to the state court, which is contrary to all the federal authorities on this point.

CHARGES IN BILL AGAINST RECEIVER'S SALE.

We will now pass to the consideration of the grounds of attack alleged in the complaint against the receiver's sale.

They are as follows:

1. That it was held in compliance with a void decree.

2. Fraud.

The first ground has been fully considered in treating with the validity of the foreclosure decree. The fraud and conspiracy charged in the complaint may be divided as follows:

1. Fraud of Isaachson, Receiver, in action of Idaho Fruit Lands Co., Ltd., v. Great Western Beet Sugar Co. et al.
2. Fraud of Bradley at receiver's sale.
3. Fraud of Watkins and Cannon, Receiver, at receiver's sale.

We will treat of these in the order above given.

Fraud of Isaachson, Receiver.

It is alleged in paragraph 8 of the complaint (Rec. 8) that Hewitt was not made a party in the Idaho Fruit Lands Co. case; that Isaachson was appointed receiver; that he issued receiver's certificates amounting to $17,675; that Hewitt verily believes that said certificates were false, fraudulent and padded, and issued for illegal claims, and issued as a result of illegal conspiracy with parties in whose favor the certificates were drawn, and that the obligations paid by said certificates were incurred by reckless and indifferent management on the part of said receiver.

The allegations just referred to merely amount to the contention on behalf of appellant that he has had no opportunity to contest the validity of said certificates, not having been a party in the action wherein they were issued. But we contend that the complaint further shows that said Hewitt did have an

opportunity to contest said certificates and that he accepted such opportunity in the foreclosure action of Hewitt v. The Great Western Beet Sugar Co. In that action the court made Finding No. 149, which is a part of the record herein, and therein recited the facts in regard to the issue of said certificates in the Idaho Fruit Lands Co. case and then made Conclusion No. 35, also part of the record herein, to the effect that said receiver's certificates had priority over all other liens and then a decree was entered upon this point decreeing said certificates to be prior to all other liens. Here was appellant's opportunity to contest said Finding, Conclusion and Decree, and the complaint herein further shows that he contested these very matters on appeal to the Supreme Court from said Decree. Said Hewitt on said appeal took the same position before the Supreme Court as is taken herein but the Supreme Court held that while he may not have been a party in the Idaho Fruit Lands Co. case that the question of the priority of the said certificates arose in this foreclosure suit and that he had an ample opportunity to contest the same. The Supreme Court, 20 Ida. 248, to which decision reference is made in the complaint herein, states:

> "Whether the appellant was a party to the suit in which such receiver was appointed does not clearly appear from the finding, but there can be no question but that in the *present suit the appellant had full opportunity*, if he saw fit, to contest such receiver's certificates, and have litigated and determined by the trial court in the present suit

the question as to whether such certificates should have been allowed. And there is nothing in the record to show that the appellant, at any time during the trial, made any contest or presented any matter to the trial court, or gave any reason why the court should not allow such certificates and make them a prior lien upon the mortgaged property. Certainly, when the question came before the trial court in the present case the *appellant had his day in court, and could have contested these certificates and their priority*, and fully litigated and offered such proof as he had, and given such reasons as existed in the law why the court should not allow the same; but the record does not disclose that the appellant took any steps to contest these liens or in any way put in issue their priority."

Therefore, the charges in the complaint herein on the fraud of Isaachson are res adjudicata, and appellant has no right to have these same matters litigated again in any other court.

Fraud of Bradley.

In paragraph 13 of the complaint (Rec. 16) it is alleged that one L. G. Bradley attended the sale and wrongfully and fraudulently, and without any authority, represented himself to be the agent and representative of said Hewitt, and pretended to have authority to bid on his behalf. There are no allegations following these charges to the effect that said acts of Bradley in attending the sale and representing he had authority to bid for Hewitt had any effect whatever on the sale. There are no allegations

that said Bradley so conducted himself at said sale that would interfere in any way so as to prevent a fair sale. How his merely attending the sale and representing he had authority to bid for Hewitt caused any other not to bid at the sale does not appear. So the allegations as they stand amount to nothing and are insufficient for any purpose, deserve no consideration and in no way strengthen the complaint. In other words, they are insufficient to show that such acts were successful in preventing a fair sale.

In the same paragraph it is further alleged that said Hewitt had been advised by counsel not to be represented at sale or bid thereat for the reason that the foreclosure decree was void, and he, therefore, refused to attend said sale or to bid thereat, or to recognize the authority of the receiver to sell. His purpose evidently being that he would stay away from the sale, take no part therein, and thereby would not consent to what he presumed an illegal sale, and also not waive any right to question the validity of the sale. On appeal to the Supreme Court, as shown by the complaint herein, the foreclosure sale was held valid. So it appears that counsel gave him wrong advice. It was, therefore, by reason of his own fault and neglect that he did not attend the sale and protect his own interests, and he must, therefore, stand the consequences. If he had attended the sale he could have prevented the property being sold for the amount of the minimum bid fixed by the court, and, no doubt, he would have done so,

if, in his judgment, the property was in fact as valuable as he alleges.

And again we claim that the issues herein raised as to the wrongful acts of Bradley are res adjudicata as having been presented to the Supreme Court by said Hewitt on appeal from the order of the court confirming the sale. The question of Bradley's acts in attending the sale and refusing to bid, and thereafter resuming negotiations with the attorney for the receiver and others was before the Supreme Court on said appeal as is shown by reference to 22 Ida. 332, referred to in the complaint herein.

Fraud of Watkins and Cannon, Receiver.

In paragraph 13 (Rec. 16) it is alleged that Watkins and Receiver Cannon conspired to deprive plaintiff of his right and extinguish his lien and to bid in the property for the amount of the receiver's certificates and the liens prior to the mortgage of said Hewitt, and that they stifled competition. It is further alleged that the minimum bid was excessively low and wholly disproportionate to the true value.

A part of these charges as to the minimum bid being excessively low and covering only the receiver's certificates and other liens prior to the Hewitt mortgage are res adjudicata as they were matters which were urged on the writ of prohibition as appears by the decision of the Supreme Court, 21 Ida. 1, as referred to in the complaint herein. This leaves for consideration the charge of conspiracy between Watkins and Cannon to stifle competition.

We contend that this charge against the receiver's sale is insufficient for the following reasons:

1. That said Hewitt litigated his objections to the confirmation of said sale and should have assigned all of his grounds and made a complete defense at one time.

2. That the allegations of fraud are insufficient.

Should Have Assigned All Grounds on First Objection.

As shown in the complaint, said Hewitt objected to the confirmation of said receiver's sale and contested the matter even by appeal to the Supreme Court. As we understand the rule of law in such cases, the party must present all of his objections at one time and not try them piecemeal.

> "Not only must a party assign a ground for his motion, but he must assign all of the grounds for the relief sought which he may have, and objections known to exist and not raised at the time of the motion may be deemed waived."
>
> 14 Ency. Pl. & Pr., 119, citing:
> Street v. Street, 113 Ala. 333.
> Con. Coal Co. v. Shaffer, 135 Ill. 210.
> Hintz v. Craupner, 138 Ill. 158.
> N. Y. v. Lyons, 24 How. Pr. 280.
> Hinson v. Catoe, 10 S. C. 311.
> Bonesteel v. Orbis, 23 Wis. 506.

Appellant may contend that there is nothing on the face of the complaint to show that said Hewitt had knowledge of said fraud. This is true, as there is no allegation as to whether or not he had know-

ledge of such fraud at the time of filing his objection and contesting the validity of the sale, but we earnestly contend that in this class of cases the burden is upon the complaining party to allege and show a court of equity that the new grounds raised were not known at the time of the first objection. It is not a matter of defense, but a question of the sufficiency of the bill in equity. When plaintiff shows on the face of his complaint that he contested the validity of the sale and filed objections thereto, he must, before he can come into a court of equity, allege that the new matters raised were not known at the time he made his first contest. If the complaint on its face did not show that he had objected to the confirmation of the sale on certain grounds at a prior time, then, of course, the defendant would have to plead the former adjudication. But the rule is otherwise where plaintiff alleges the former adjudication and he must then, in order to have any standing in equity, explain why he did not raise the objections sought to be raised in the second suit and must further clear himself by showing that he was not negligent in ascertaining the new matter at the time of his first contest.

The complaint shows that the plaintiff has had his day in court as to contesting the validity of the sale. He should also have alleged that the objections now raised to the confirmation were not urged at the prior contest and furthermore explain why not. A good excuse must appear on the face of the complaint

and if this is lacking a court of equity will not take cognizance of the case.

Allegations of Fraud Insufficient.

The allegations of the conspiracy between Watkins and Cannon are most entirely conclusions (Rec. 18). It is alleged that Watkins wrongfully, unlawfully and illegally conniving and conspiring with Cannon to illegally, wrongfully and unlawfully deprive this plaintiff of his right, bid in the property for the minimum bid. Such allegations are insufficient in an action of this kind, as the bill must set forth the facts of the conspiracy.

In I Black on Judgments, Sec. 369, it is stated:

> "And allegations that the judgment was obtained through fraud and ill practices are too vague and general."

And again, in Sec. 393:

> "And it (the bill) must set forth the facts constituting the fraud."

And again, in Sec. 393:

> "Thus, where it is alleged that the adverse party practiced fraud in obtaining judgment, the facts showing such fraud must be stated in a plain and concise manner, as in other cases, mere knowledge of certain facts not being sufficient; the fraudulent acts and proceedings of such party, designed and practiced for the purpose of securing an unfair, unjust judgment, must be clearly shown."

It would be useless to attempt to cite the many authorities on this question, as the rule is so universal.

Laches in Raising Fraud.

The complaint shows that the sale was had on January 5, 1912; that said Hewitt objected to the confirmation of the sale; the lower court overruled his objections and an appeal was taken to the Supreme Court, which court affirmed the judgment of the lower court on the 15th day of July, 1912. The complaint herein was filed April 30, 1914.

So the complaint shows that a period of about one year and ten months expired before appellant herein sought relief.

One of the most essential elements in an action of this kind is that the plaintiff by proper allegations must exonerate himself and show that his lack of attention in seeking relief in equity was not by reason of his own fault or neglect.

Appellant, in discussing the question of laches, states that the bill is virtually alive with allegations as to the strenuous litigation that plaintiff maintained, and then adds that to hold that the plaintiff is guilty of laches, is almost humorous. It appears to us that appellant entirely misunderstands the application of the principle of laches to the action herein. We do not contend that he was not diligent in prosecuting his remedies in the State Courts, but the question of what he has been doing since and why he did not file his bill in equity herein on the ground of fraud at the sale until two years and four months after the sale is the laches that we are complaining of.

These dates appear upon the face of the complaint and it was incumbent upon the plaintiff to further show upon the face of the complaint a sufficient and satisfactory excuse for such delay. Remaining silent where fraud is the ground for such a length of time, and permitting the property in question to be transferred and conveyed, is unquestionably gross laches, especially when it appears that the property in question is an irrigation system of the magnitude of the one in question where hundreds of thousands of dollars have necessarily been expended in the repair, maintenance and reconstruction of the system. There are numerous cases of this character which might be cited, wherein such a delay under such circumstances would by a court of equity be considered laches unless satisfactorily explained.

Complaint is Subject to Demurrer or Motion to Dismiss if Laches Appear Upon its Face.

The legal principles of laches are well defined. The question first arising is: Must laches be specifically pleaded by defendant? There seems to be no controversy on this point as appellant in his brief admits that if laches appear upon the face of the bill then advantage may be taken thereof by demurrer or motion to dismiss. In 6 Enc. Pl. & Pr. 405, it is stated:

> "Where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself." (Citing many cases.)

In 12 Enc. Pl. & Pr. 829, it is stated:

> "According to what is considered the better practice, the defense of laches is one of which it is not necessary to take advantage by the pleadings. If the case as it appears at the hearing is liable to such objection, the court may and usually will remain passive, and refuse relief or decline to entertain the suit."

In 12 Enc. of Pl. & Pr. 831, we find:

> "It is stated that laches is a defense which may be made by plea, answer or demurrer."

In Spespy v. Comer, 76 Ala. 501, it is held:

> "If the laches appears on the face of the bill and is unexplained, it is good ground for dismissing the bill on motion for want of equity without answer, demurrer or plea."

In Graham v. B., etc., R. Co., 118 U. S. 161, it is held:

> "The bill was properly dismissed on demurrer on the ground of laches."

Complaint Must Set Forth Facts Excusing Laches.

The next inquiry is: Must the complainant plead facts showing that he has not been guilty of laches? Here again the law seems to be well settled that the complaint must show how the plaintiff was put on inquiry as to the alleged fraud; by what means it was ascertained, and why discovery, by exercise of ordinary prudence, might not have been made at an earlier date.

The following authorities show that the complaint must set forth the facts on which plaintiff relies as showing that he has not been guilty of laches:

I Black on Judgments, Sec. 393.
23 Cyc., 1042.
12 Enc. Pl. & Pr., 835.
P., etc., Ry. Co. v. K. & H. B. Co., 107 Fed. 786.
Christy v. A., T., etc., Ry. Co., 214 Fed. 1016.

In 12 Enc. Pl. & Pr. 836, it is stated:

> "The allegation (excusing laches) must be full, clear, and specific; positive, definite, and distinct; not vague nor uncertain; and no mere generality of statement will meet the requirements."

And again, on page 837, it is stated:

> "The foregoing rules are peculiarly applicable to cases where excuse for laches may be founded upon fraud * * * *. And in such cases it is necessary to allege these facts in avoidance of the bill."

Again, on page 838, it is stated:

> "In seeking to avoid the effect of laches on the ground of fraud the plaintiff must allege in his bill that he was ignorant of it or that it was concealed from him. He must aver that his ignorance was not the result of negligence and was without fault of his own. Complaint should state how he came to be so long ignorant."

The mere statement in the complaint of the conclusion that he has not been negligent as appears in the complaint herein is insufficient. The mere allegation that plaintiff would have filed this suit long prior hereto had he not been engaged in investigating the facts and the law applicable to this suit, amount to nothing. He must set forth the facts of his investigation of the facts and the law, in order

that the Court may see whether or not he has been diligent. In I Black on Judgmentss, Sec. 393, we find the following:

> "He must set forth the *facts* which he relies on as showing such diligence. For instance, a statement that complainant used all the diligence in his power to procure the evidence necessary to defeat the suit at law is not sufficient; the facts in regard to the diligence used must be set out, so that the court can determine whether proper diligence has been exercised."

In 23 Cyc. 1042, it is stated:

> "He must set forth the facts which he relies on as showing such diligence."

And again, in 23 Cyc., 1011, it is stated:

> "He must show the exercise of due diligence to discover his defense."

MUST ALLEGE TIME OF DISCOVERY OF FRAUD.

Although plaintiff alleges certain fraud, he fails to allege when such fraud was discovered. This is a vital defect. Such an allegation is necessary for two reasons:

1. In order for the court to determine whether or not complainant is guilty of laches.

2. Whether or not the fraud was discovered in time whereby the party would have had an adequate remedy at law by proceeding in the original action to set aside the decree.

The authorities are almost unanimous in holding that in an action of this character the following must be alleged, the fraud, when discovered, how ascer-

tained and why discovery could not have been made sooner by exercise of ordinary prudence. The rule is well stated in Lataillade v. Orena, 91 Cal. 566, where the court, in speaking of the discovery of the fraud, holds:

> "Must show that he used due diligence to detect it, and must state when any particular discovery was made, what it was, and why it was not made sooner, and will be presumed to have known what with reasonable diligence he might have ascertained concerning the fraud of which he complains."

The same is held in the following cases:

Truett v. Onderdonk, 120 Cal. 581.
Robertson v. Burrell, 110 Cal. 568.
L. S. C. Co. v. Wood, 113 Cal. 482.
Eldred v. White, 102 Cal. 600.
P., etc., Co. v. K. & H. B. Co., 107 Fed. 782.

Time of discovery of fraud must be alleged:

Hendryx v. Perkins, 114 Fed. 801-811.
Hardt v. Heidmeyer, 152 U. S. 546.
Stearns v. Page, 1 Story 204.
Stearns v. Page, 12 L. ed. 928.
Landsdale v. Smith, 106 U. S. 394.
Hammond v. Hopkins, 143 U. S. 251.
Felix v. Patrick, 145 U. S. 317.
Foster v. Mansfield, 146 U. S. 88.

In 12 Enc. Pl. & Pr., 838, it is stated:

> "As to the discovery of the fraud, the bill must show what the discovery was, *and it is a requisite that the time of discovery be distinctly alleged.* It should also appear how the discovery was made. The court should be able to see from the aver-

ments why the discovery was not sooner made by the use of reasonable diligence."

In Stearns v. Page, 1 Story 204, it is held:

"And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches * * * *. But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time."

On appeal in 12 L. ed., 928, it is held:

"And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made."

In Badger v. Badger, 69 U. S. 87, it is held:

"The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill."

In Wood v. Carpenter, 101 U. S. 135, it is held:

> "A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner."

If Fraud Discovered in Time Should Have Pursued His Remedy at Law.

The time of discovery of the fraud is again material to enable the Court to determine whether or not it was discovered in time for the plaintiff to proceed in the State Court to vacate the decree by motion. In I Black on Judgments, Sec. 362, it is stated that the liberal practice of the courts in granting new trials and entertaining motions to vacate their own judgments under statutory enactments on grounds of mistake, inadvertence, surprise or excusable neglect have considerably abridged the province of equity in giving relief. And then the general rule is laid down that equity will not grant relief if the party can be relieved on motion to vacate. Under Sec. 4229, Idaho Revised Codes, a judgment or order can be vacated on grounds of mistake, inadvertence, etc., within six months. So if the plaintiff discovered the fraud alleged in the complaint prior to the six-months period, then he should have proceeded in the district court to vacate the sale, and if he had such knowledge and failed to so proceed, then he lost his remedy at law through his own neglect and equity would grant him no relief.

The following authorities sustain this rule:

I Black on Judgments, §§ 362-387.
Freeman on Judgments, §§ 486-489.
3 Pomeroy's Eq. Juris., § 1361.
Story, Eq. Jur., §§ 894-896.
Bigelow on Estoppel, 151.
I Whitehouse Eq. Prac., § 152.
I Joyce on Irr., § 547.
Brown v. C. of B. V., 95 U. S. 157.
Nougue v. Clapp, 101 U. S. 551.
Parson v. Weis, 77 Pac. 1010 (Cal.)

In T. P. A. v. Gilbert, 111 Fed. 269, it is held:

> "Where the statutes of a state provide for proceedings in a court of law to set aside a judgment by such court on the ground of fraud * * * such provisions * * * afford a plain and adequate remedy at law which excludes the jurisdiction of equity."

In Graham v. B. H. & E. R. Co., 14 Fed. 753, it is held:

> "A circuit court of the United States cannot revise or set aside a final decree rendered by a state court, which had complete jurisdiction of the parties and subject-matter, upon the ground of fraud in obtaining the decree, where the injured party had an opportunity to apply to the state court to reverse the decree."

Thus, if the complaint had the proper averments of the time of discovery of the fraud and it appeared therefrom that the complainant had a remedy in the original proceeding which he might have availed himself of, then he would be chargeable with negli-

gence and laches and would be denied relief in his equity action herein.

So in this class of cases it may always be conceded that the judgment sought to be vacated may be unjust, but complainant must still further show that he did not make a discovery in time to avail himself of his remedy at law in the original proceeding.

MERITORIOUS DEFENSE.

Another indispensable element in an action of this kind is that the complaining party must allege that he has a meritorious defense to the original action, otherwise no cause of action exists. In I Black on Judgments, Sec. 393, the rule is stated:

> "A bill of equity for the vacation of a judgment, or to enjoin its enforcement, should always show that the merits of the controversy are with the complainant. If it fails to allege a good and meritorious defense to the claim on which the judgment was rendered, so that it would be inequitable and unjust to allow the enforcement of the judgment as it stands, the bill states no cause of action and must be dismissed."

In 23 Cyc., 1031, it is stated:

> "Such relief will not be granted unless the complainant shows that he has a good and meritorious defense to the original action." (Citing numerous cases.)

It is not sufficient to merely allege that one has a meritorious defense or that he has stated the facts to his attorney and is advised that he has a good defense,

but he must specifically set out the facts constituting it, so that the court can conclude whether or not it is a good defense.

I Black on Judgments, Sec. 393.
23 Cyc., 1039.
Christy v. Atkinson, 214 Fed. 1020.
Eldred v. White, 102 Cal., 600.

The complaint herein does not even allege the conclusion that the plaintiff has a meritorious defense. There are no allegations whatever to the effect that plaintiff has a good or meritorious defense to the original action; there are no allegations even attempting to set forth what the facts constituting any meritorious defense that the plaintiff might claim to have in the original action. If plaintiff contends that it can be seen from the allegations in the complaint what his defense will be, we reply that we do not believe that his meritorious defense should be drawn by inferences from other allegations, but should be directly alleged. If it is to be inferred that his defense will be that the receiver's certificates are subsequent in priority to the Hewitt mortgage, then we reply that the complaint shows that this question is res adjudicata as the Supreme Court held in 20 Ida. 235, that said Hewitt had had his day in court in the foreclosure proceedings to contest the validity and priority of said certificates, and, therefore, he was bound by the decrees holding that said receiver's certificates were prior to the Hewitt mortgage.

Appellant at least must convince this Court that

the law laid down by the Supreme Court of the State of Idaho in Dalliba vs. Winschell, 11 Ida. 364, and C. T. Co. vs. I. B. Co. 25 Ida. 755 to the effect that a court of equity has power to appoint a receiver of property and direct him to care for, protect and preserve the property, and decree the charges therefor as prior liens to all other liens, mortgages or encumbrances. Such a power of a court of equity in regard to quasi-public corporations must be recognized.

It is held in Union Trust Co. vs. I. M. R. Co. 117 U. S. 434 as follows:

> "That the power of a court of equity having charge of railroad property to make necessary repairs does not depend upon the consent of those interested, nor upon prior notice to them."

The court then goes on to hold subsequent opportunity to be heard as to the propriety of the expenditures and of making them a first lien, is judicially equivalent to prior notice.

Such a holding is directly in point in the present case. While the complaint shows that Hewitt was not a party in the Idaho Fruit Lands Co. case, wherein the receivers' certificates were issued, it further shows that subsequently he had an opportunity to contest these certificates in an action in which he was a party, to-wit, the foreclosure suit.

STATUTE OF LIMITATIONS.

Appellant states that the question of the Statute of Limitations was the one that seemed to give the lower court great difficulty, and on which the lower

court sustained defendant's motion to dismiss. We are at a loss to understand where appellant gets this idea. The Judgment of Dismissal (Rec. 46) shows that the court sustained the motion to dismiss on the grounds, (1) that the judgment sought to be avoided were rendered by courts of competent jurisdiction, were conclusive and res adjudicata, (2) that a foreclosure of the Hewitt mortgage is barred by Sec. 4052 R. C. of Idaho, (3) that the bill should be dismissed for want of equity, and (4) that the facts stated in the complaint are insufficient to entitle complainant to any relief in a court of equity. How appellant can select one ground, the Statute of Limitations, on a judgment of dismissal setting forth four grounds is hard to understand. Such a suggestion in appellant's brief surely can not be based upon the remarks of Judge Dietrich in sustaining the motion, as he made it quite clear that he was of the opinion that the question of the validity of the foreclosure decree was res adjudicata, and that said Hewitt could not again be heard on the same matter, and further that the other allegations of the complaint in regard to fraud, laches, etc., were insufficient to entitle plaintiff to relief. But regardless of the ideas of counsel for appprincipal ground, we take it that the judgment of Dismissal itself is the best evidence and will be decisive. Again it is immaterial on what ground the lower court decided the motion to dismiss as its decision will be affirmed by the appellate court if any ground of the motion is sufficient.

The first question on this point to determine is as

to pleading the Statute of Limitations. Can this plea be taken advantage of by demurrer or motion to dismiss? The general rule is, that where it appears upon the face of the complaint that the Statute has run it may be raised by demurrer.

The question is definitely settled in Idaho in the case of Chemung M. Co. vs. Hanley, 9 Ida. 787, wherein it is held:

> "The plea of the Statute of Limitations may be taken either by demurrer or answer—by demurrer if it clearly appears upon the face of the complaint that the cause of action did not accrue within the statutory time, otherwise by answer."

The established rule is stated in 13 Enc. Pl. & Pr. 201, as follows:

> "Though some doubt formerly existed on the subject, yet it is now and long has been the established general rule that in equity, where it appears on the face of the bill that the bar of the statute has attached, objection may be made and the defense raised by demurrer. If the bill alleges no matters to avoid the bar apparent on its face, it will be considered as stating no cause of action; and it is only by alleging exceptions or grounds of avoidance to defeat the apparent bar that the plaintiff can prevent the bill from being demurrable."

The next general rule is that the bar of the Statute must be specially pleaded and cannot be raised by general demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Chemung M. Co. vs. Hanley, 9 Ida. 787.

Respondent brought itself within this rule by specially pleading in its motion to dismiss that the action herein is barred by certain provisions of the Idaho Code.

The motion to dismiss herein included the ground that the cause of action herein is barred by Sec. 4054, sub. 4 and by Sec. 4052 of the Revised Codes of Idaho Said Sec. 4054, providing that an action for relief on the ground of fraud must be brought within three years, can be eliminated. Under said Section the cause of action does not accrue until the discovery of the fraud and there is no allegation in the complaint as to when the fraud was discovered, and besides three years from the sale did not expire before the action herein was commenced.

There is no merit in appellant's contention that Sec. 4051 Idaho Codes governs the commencement of the action herein. Said Section provides: "Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States." This section only applies to actions on judgments of sister states or foreign judgments.

As to the commencement of an action upon a written contract Sec. 4052 provides: "Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing."

The complaint shows that the last note, secured by the Hewitt mortgage, became due July 30, 1908. The complaint herein was filed April 30, 1914. This

makes five years and nine months after the cause of action to foreclose accrued.

There seems to be some misapprehension on this question of the Statute of the Limitations herein. While the respondent raised the question of the action herein being barred by the Statute of Limitations, it will be noticed that the Court in its judgment of dismissal did not state that the action herein on either the fraud feature or want of jurisdiction in entering the foreclosure decree was barred. The court's position being that if the judgments were annulled as prayed for, "such holding would be ineffective and useless for the reason that no further relief of foreclosing the mortgage of the plaintiff, as prayed for herein, could be granted, as an action of foreclosure thereon is barred by the provisions of Sec. 4052 of the Revised Codes of the State of Idaho." (Rec. 47.) So it appears that the lower court considered that it would be useless, even if the matters were not res adjudicata, to litigate the validity of the foreclosure decree, for if successful said Hewitt had slept on his rights, if any he had on foreclosure, by waiting until the Statute of Limitations had run against a foreclosure of his mortgage. As heretofore discussed no reason is given in the complaint why the said Hewitt, after the decision on appeal was rendered, September 26th, 1911, sustaining the validity of the foreclosure decree, did not proceed long before April 30th, 1914, the date of the commencement of the action herein, with an action which would involve his foreclosure if the former fore-

closure proceeding was void. In other words, after finishing his appeal in the state court, and having knowledge that the foreclosure decree had been sustained which he claimed at all times was void, he waited about two years and seven months before proceeding at all.

We take it that the wording in the judgment of dismissal on this point was more along the line of the allegations in the complaint being insufficient to excuse the delay of plaintiff and showing want of equity.

The question of the Statute of Limitations being tolled during pendency of an appeal is far from being settled. There seems to be no well defined rule on this point.

Appellant discusses the question of exceptions and recognizes the general rule that courts cannot create exceptions to the statute. And he then proceeds and cites a few cases where a limited class of exceptions have been recognized, to-wit: those arising out of necessity. Under the general rule as quoted by appellant from 19 Ency. of Law 215, we find four cases cited which are also cited in appellant's brief. One case is where the party was prohibited by an act of Congress from bringing suit for the recovery of a certain tax until the claim had been presented, and then appealed to the Commissioner of the Internal Revenue; one was where there was a conspiracy among all of the officials of a city to resign to prevent service of process upon it; one was where a Treaty of Peace of 1783 prevented the operation of a state

statute and the other was where it was held the statute was suspended by reason of war.

Appellant then quotes from the same volume to show that the same rule applies and an exception is recognized without statute where by legal proceedings, such as an appeal, one is prevented from bringing his suit. In examining the cases cited in the note we find that cases cited do not, to any great extent, bear out the text. In fact, there seems to be very few cases that have treated of the specific exception of the statute being tolled by appeals.

The Idaho Codes specifically provide for certain exceptions when the statute will not run. Among the same is found legal proceedings, etc. Sec. 4073 provides that if an action is commenced within the time prescribed therefor, and a judgment therein for plaintiff be reversed on appeal, the plaintiff may commence a new action within one year after the reversal; and in Sec. 4074 it is provided that when the commencement of an action is stayed by an injunction or statutory prohibition the time used in such proceedings is excluded.

Now it appears to us that where a state statute provides for the exceptions and among the exceptions are *certain* legal proceedings, then all other legal proceedings are excluded. There is no section of the Idaho Codes which provides for an exception in the case of appeals.

Appellant had plenty of time to institute the action herein or any other action in relation to fore-

closing his mortgage, if he thought he had a right to again foreclose same, long before April 30th, 1914, the date of the institution of the suit herein and after the conclusion of his litigation on appeal on September 26th, 1911, a period of two years and seven months. If he had brought his action ten months before the action herein, the statute would not have run on the institution of an action to foreclose his mortgage, if he had any right of action to a second foreclosure.

ANSWERING AUTHORITIES CITED BY APPELLANT.

On Point Judgment is Void as to One Not a Party.

The case of Metropolitan Tr. Co. vs. L. C. Elec. Co., 100 Fed. 397, is cited on the point that a judgment is void as to one who is not made a party to the action and is of no effect whatever. In that case a receiver was appointed who issued certificates, as liens against the property, and later an action was brought in the United States Court to determine the priority of all liens. It was held that those not parties to the first suit wherein the receiver's certificates were issued, were not bound by the order making them prior liens.

The appellant likens this case to the case at bar in that he was not a party in the Idaho Fruit Lands Company case wherein the receiver's certificates were issued for the care and preservation of the property, and that, therefore, he can now raise the question in an action in the federal court and have

the judgment of the state court vacated. It is readily seen that said case is not, as stated by appellant, on all fours with the one at bar. It would be if we eliminate the foreclosure action in the state court. Appellant entirely overlooks the fact that he brought a foreclosure suit in the state court wherein the receiver became a party, and he was given an opportunity to contest the priority of the receiver's certificates. In other words, had his day in court on this matter as stated by the Supreme Court of Idaho. If it was not for his first foreclosure suit in the state court in which these matters were drawn in issue and presented to the Superme Court on appeal, we would not be here contending that the receiver's certificates, in an action wherein the appellant was not a party, could be held prior to his mortgage.

In the Metropolitan case the court held that if the action in the federal court was for the same purpose as in the state court, and between the same parties, it would not take jurisdiction. That is the situation of appellant exactly. His action now is to set aside a judgment of a state court and have another foreclosure; the identical action that he had in the state court and between the same parties or their privies.

Appellant also cites Union Tr. Co. vs. Ill. M. Ry. Co. 117 U. S. 434 as sustaining the same principle. We have heretofore cited this case in our favor. The court there held it was not necessary in actions involving receivership of railroads and issuing of receiver's certificates to have all parties before it at the time the receiver's certificates were issued in or-

der to make them prior liens. It was sufficient if they had an opportunity at some later day to contest the certificates and their priority. Such a holding places this case directly in our favor, as appellant had an opportunity to contest the certificates and their priority in his foreclosure suit, although he may not have been made a party in the Idaho Fruit Lands Co. suit.

On Point Judgment Not Based Upon Issues Raised in Pleadings Is Void.

The case of Munday vs. Vail, 34 N. J. L. 418, is cited on the point that a judgment based upon issues not raised by the pleadings is void. The point in that case was whether or not a judgment was void which was entered by a state court to the effect a certain trust deed was void against *everybody* when the pleadings were to the effect that it was void as against a certain judgment only. The court held that such judgment was void from the facts of the record showing that such an issue had not been made. In other words, want of jurisdiction on this point appeared upon the face of the record.

We desire to call this Court's attention to the fact that said action was not for the purpose of vacating said void judgment of the state court, but was an action to recover the property. Therefore, as stated in the decision, a collateral attack was made. Suppose, for instance, the action in the federal court had been a direct attack to *vacate* the judgment of the state court, what would the federal court have done with such an action? From the great weight of authority,

especially the federal authorities, the court would have refused relief in equity for the reason that the invalidity of the judgment appeared upon the face of the record and could, therefore, be disregarded or taken advantage of by motion or appeal in the original action. This is exactly what was held in the leading case on this question, Little Rock J. Ry. vs. Burke, 66 Fed. 83. In that case the court refused to grant equitable relief to vacate the judgment of the state court in the ground that the judgment was void as appeared from the face of the record, and therefore, the party had an adequate remedy at law, or he could attack the same in a collateral suit, as ejectment. In discussing the federal cases bearing upon this point, the Court in Nat. Sur. Co. vs. State Bank, 120 Fed. 599, commenting on the Burke case, states that relief was denied because "the facts stated in the case appeared on the face of the record in the state court and were as available in ejectment as in equity." This is the real point to be borne in mind at all times in passing upon the question of vacating a judgment of a state court where the ground is want of jurisdiction. If the judgment is void on the face of the record, then it is subject to collateral attack at any time and therefore, a court of equity will not proceed to vacate the judgment. It is only where the judgment appears valid upon its face, and it takes extrinsic evidence to show its invalidity, thus raising new issues, that a court of equity will grant relief.

The conclusion must be that the ruling on the question of "want of jurisdiction appearing upon the

face of the record" is exactly opposite in an equitable action to vacate the judgment of a state court on this ground, to that in an action of a collateral attack, to-wit:

1. That in an equitable action to vacate, want of jurisdiction appearing upon the face of the record is not a sufficient ground.

2. In an action wherein a collateral attack is made, want of jurisdiction appearing upon the face of the record is a sufficient and necessary ground.

So why does appellant cite cases of collateral attack as being applicable in his equitable action herein to vacate the judgment of the state court on the ground of want of jurisdiction appearing upon the face of the record? There are many United States cases, as heretofore cited, fully establishing such a rule. So we do not need to look to the principles laid down as to the conclusiveness of judgments on collateral attacks.

The case of Reynolds vs. Stockton, 140 U. S. 254, is also cited with the Munday case. In fact, the Supreme Court on one feature of the case quotes extensively from the Munday case. We desire to call the Court's attention to the fact that appellant is again citing a case of collateral attack, as the questions arising in the Reynolds case were upon a collateral attack to a judgment of a sister state. Here again, the rule is laid down that where it is shown that want of jurisdiction appears upon the face of the record, the judgment can be attacked collaterally.

The same analysis which we have heretofore made of the Munday case would therefore apply. We further call the Court's attention to the fact that in the Reynolds case there was the double aspect running through the entire case, to-wit, that the judgment was not responsive to the issues presented by the pleadings, *and was rendered in the absence of the defendant.* It was held that where the complaint states one cause of action and defendant appears, that a subsequent judgment in the absence of the defendant upon another and different cause of action than that stated in the complaint is void. A further statement of the case shows that the receiver had been discharged prior to the entry of the judgment complained of. Such a condition of affairs would undoubtedly make the judgment subject to collateral attack.

The case of Corwithe vs. Griffing, 21 Barb. 2, is exactly in accord with our contention. It was an action to vacate a judgment of a state court on ground of fraud and also on the ground of want of jurisdiction. The court held that the judgment was not void on the face of the record and that it was "necessary to resort to exterior evidence to show it," therefore, a court of equity would take jurisdiction. This raised new issues foreign to the action in the state court and would warrant equitable action. It required more than a review of the record and proof in the original action.

The case of West vs. Shurtliff, 79 Pac. 180, is not in point for the reason that it was an action to vacate

a judgment on the ground that a personal judgment had been entered through *mistake.*

A quotation on the rule is made from 23 Cyc. 816. This quotation shows that the issues may not have been raised by the pleadings, but may have been brought before the court by "any statement or claim of the parties." So it does not necessarily follow that an issue not raised by the pleadings is void as it may have been properly placed in issue and contested during the trial. Again the quotation made is under the heading of "Judgments—Conformity to Pleadings" and is not found in the chapter treating of actions to vacate judgments on the ground the court exceeded its jurisdiction. Most of the cases cited under the quotation are where appeals were taken from the original action and upon a review of both the pleadings and the transcript of the evidence, and the court held the judgment was not supported by the pleadings and proof and therefore void, or were cases where collateral attacks were made upon the judgment and it was held that the record showed on its face that the court was without jurisdiction and therefore void.

Therefore, such quotations and authorities cited thereunder, as heretofore shown in our brief, do not support the contention of appellant that a court of equity will grant relief for such alleged errors.

On Point That Affirmance of Void Judgment by Supreme Court Has no Effect.

On page 51 of appellant's brief a quotation is made from 23 Cyc. 698 to the effect that a void judgment

cannot be made valid by the taking of an appeal from it or even by an affirmance on appeal. Such a statement of law is rather startling without any exception being made. The first thought which occurs is: Suppose the validity of the judgment was attacked on the appeal and the Supreme Court holds the judgment is valid? One would naturally think that then the party had had his day in court and he would be bound by such decision.

And such is the law, and if appellant in making said quotation from Cyc. had finished the sentence, it would so appear. The quotation stops at a comma in the text and immediately following same are the words:

> "If the affirmance is on grounds not affecting the question of validity."

The completion of the quotation leaves the appellant without any argument whatever to sustain his position.

On Point Void Decree Will Not Support Sale.

There is no dispute on such a principle of law, but appellant must first prove the foreclosure decree is void. We have heretofore discussed the question of the validity of the foreclosure decree and that the errors appearing are not sufficient to warrant a court of equity to interfere, and further that the issues raised on this point are res adjudicata.

Appellant also contends that the action of the Supreme Court in overruling objections to sale and affirming the confirmation thereof adds nothing. In

reply, we will state that the Supreme Court having held on a former appeal that the foreclosure decree was valid where the same objections to its invalidity were raised as are raised in the complaint herein, then the sale is based on a valid decree, and therefore, appellant's position is untenable.

On Point Whether Court of Equity Can Grant Relief Herein.

On page 53, appellant's theory is very apparent. He contends the foreclosure decree is void and he then contends that he can keep on attacking its validity until he finds some court which will declare it void. He states that he had concurrent remedies in that "he can either appeal and take his chances on having the appellate court reverse the judgment or he can bring an independent suit in equity to set it aside and restrain its enforcement." Such a statement may be correct, but when he follows the same with the statement that he could pursue a path of safety by first resorting to one of the remedies and raising the question of the validity of the decree, and if then unsuccessful, could pursue the other remedy on the same grounds, he over-reaches himself in his enthusiasm, and exposes the frailty of the basis upon which he stands.

23 Cyc. 987, is quoted to the effect that a federal court can vacate a judgment of a state court on the ground that it was procured by fraud, *or was void for want of jurisdiction.* In the opening of our brief we stated the rule as now recognized by the federal court. We have heretofore discussed fully the ques-

tion of fraud alleged in the bill and also the power of the federal court to vacate on the ground of want of jurisdiction. And we submit that each and every case which appellant cites bears out the positions for which we contend. Appellant throughout his brief up to discussing this point insisted that the decree was void for the reason that it was not warranted by the pleadings; this invalidity, according to his theory, would appear upon the face of the record. We cite many cases showing that the invalidity of the judgment, if appearing upon the face of the record, is not sufficient ground to warrant the intervention of a court of equity. And then on page 54 we find the appellant, in discussing the power of equity to enjoin where a judgment is void, admitting this proposition as follows:

> "And especially so if a judgment is regular upon its face and does not disclose the grounds of its invalidity."

Although appellant states that if the "judgment" is regular on its face, appellant no doubt means if the "record" is regular on its face. It appears then that we are arriving at a common ground, to-wit: that if it requires a trial of "new facts" on "new issues" such as fraud in the obtaining of the judgment or false affidavits in obtaining service of the person, where the record shows the defendant was served, then a court of equity will intervene.

There are five cases, three of which are discussed in appellant's brief, cited in the note to the quotation from 23 Cyc. 987. One was on the ground of fraud

and the other four cases, Howard vs. DeCordova, 177 U. S. 609, N. P. R. Co. vs. Kurtzman, 82 Fed. 241, McNeil vs. McNeil, 78 Fed. 834; Davenport vs. Moore, 74 Fed. 945, are cases where courts of equity were asked to intervene where the record showed on its face that the court had jurisdiction of the defendants, when in fact said defendants had never been served. Here was raised the question of "want of jurisdiction" which must have been determined by facts extrinsic to the trials in the original action. There is no question that in such cases it is well established that federal courts will intervene on their equity side. There are several other federal cases besides the above four cases so holding, and we wish it clearly understood that we are not opposing the principle upon which the court acts in this class of cases, where the record is false as to the service upon the defendant and he had no knowledge of the action or opportunity to defend.

And again there may be cases where a court of equity would intervene upon a showing that the plaintiff was seeking to enforce a judgment in an action wherein the record showed that the service by publication was defective and failed to recite jurisdictional facts in regard to the publication but these cases are few indeed.

The case of Arrowsmith vs. Gleason, 129 U. S. 86, is also cited as authority for a court of equity to vacate a judicial sale on the ground of fraud. This case follows the other United States cases on this point and holds that a court of equity would give relief where a

judgment was obtained through fraud which was extrinsic to the issues in the original action. The sale in question in this case was one by the probate court and was procured through fraud, and the orders also entered therein were obtained fraudulently.

On Point of Unauthorized Acts of Bradley.

The case of Cooper vs. Newell, 173 U. S. 555, is cited for the purpose of showing that the allegations of the complaint herein, that Bradley attended the sale and wrongfully and fraudulently represented himself to be the agent of Hewitt and that he had authority to bid for him at the sale, were such as to constitute an unauthorized appearance which would avoid the sale.

The Cooper-Newell case was one where the defendant had no knowledge of the action whatever, but an attorney, without any authority whatever, appeared for the defendant. We are unable to grasp the similarity between these two cases. It is an entirely different thing where an attorney appears in an action without any authority, and judgment is entered against the defendant, and where an individual merely appears at a sale and states that he represents a certain party and that he has authority to bid for him. There are no allegations in the complaint showing that Bradley's acts in making these statements interfered with the sale in any way. It does not appear that such acts had any effect upon the sale or that there was not a fair sale by reason of his acts. Again there are no allegations that the now owners of the canal system, or that the Receiver

or purchaser at the sale were instrumental in having Mr. Bradley attend the sale and make such representations. So far as the complaint shows he did not come other than at his own desire and therefore any acts of his could not affect the validity of the sale.

Appellant refers to the allegations in the complaint that the property was worth fully five hundred thousand dollars, and that through the design of others it was struck off to the purchaser for $56,546.79. It is then suggested that inadequacy of price is in general not sufficient to set aside a judicial sale unless it raises a presumption of fraud or shocks the conscience of the court. Here we have appellant asking this Court to take into consideration the inadequacy of price and the minimum bid. These matters were fully raised upon the hearing of the writ of prohibition and upon objection to the confirmation of the sale. They were presented to courts which had jurisdiction of the matter and were passed upon. The decisions of the Supreme Court referred to in the complaint show fully how these matters were raised and adjudicated on appeal. The question of the alleged injustice and illegal discrimination against said Hewitt, by the court in placing the minimum bid at only $56,546.79 and covering receiver's certificates and some other liens, was all raised on the writ of prohibition, and the question of a grossly inadequate price was raised upon the objections to the confirmation of the sale and upon an appeal therefrom. In passing upon the claim of inadequate consideration, the Supreme Court, in 22 Ida. 335, states: "And

while it is argued that the sale was for an adequate consideration, there is nothing in the record to substantiate that contention." Said decision shows that said Hewitt was very active in looking after his interests, and further that the Receiver and his attorneys did everything in their power to give said Hewitt time to investigate the value of the system before the day of the sale. The sale was continued twice, as shown by said decision, at the request of said Hewitt, and when a day was fixed agreeable to him, he failed to appear at the sale and make any bid whatever. In fact, the attorneys representing him notified the Receiver and his attorneys, prior to the bid, that the system was not worth the minimum bid of fifty-six thousand dollars and that he would not pay that much cash for it. After the sale, Mr. Hewitt was given the first opportunity to take over the system upon the bid of the purchaser Watkins, at the figure bid. The decision of the Supreme Court, 22 Ida. 335, shows that these negotiations were carried on between said Watkins and the representatives of said Hewitt; and further on page 332 it is shown that said Hewitt, through his agent, resumed negotiations after the sale and that said Hewitt would not advance the amount bid by Watkins and take over the system; it then further appears on page 333 that after said Hewitt would not make good the minimum bid, that it was then the parties interested sought to enlist the aid of others and interested James H. Brady, who advanced the necessary money. So these matters were harped upon and argued time and again to the Idaho courts and it was found that there was nothing

whatever in their complaints, and that said Hewitt had had every opportunity to take over the property at the minimum bid, and there can be but one conclusion that the old broken down system which had been in a receiver's hands for three years, was not worth it. And we might say in passing that there might have been a deplorable condition in that community if James H. Brady, who is United States Senator from the State of Idaho, had not been public spirited enough to come to the rescue of the users of water under said system. And further under our charge of laches we can fairly argue that a canal system of such extensions, as is shown in the description in the mortgage, would necessarily take hundreds of thousands of dollars, which it has, for repairs, maintenance, reconstruction, etc., which has been almost entirely borne by Senator Brady, and that this Court, having such a system in issue, cannot help but hold that said Hewitt is guilty of laches when he waited two years and four months before commencing the action herein after the said sale.

We submit that the bill of complaint herein is legally deficient on the many points herein presented, and that the same is wanting in equity and is insufficient to entitle the complainant to any relief in a court of equity, and that the decision of the district court should be affirmed.

Respectfully submitted,

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